

OFFICE COPY

Supreme Court, 11

FILED

AL 9-190

APPENDIX

U. S. DEPT. OF JUSTICE

Supreme Court of the United States

WINTER TERM, 1900

No. 36

*James E. Groppi*  
JAMES EDWARD GROPP, APPELLANT,

vs.  
STATE OF WISCONSIN, RESPONDENT.

ON APPEAL TO THE SUPREME COURT OF WISCONSIN

WRIT OF HABEAS CORPUS GRANTED NOV. 17, 1900

RECEIVED DEPARTMENT OF JUSTICE NOV. 18, 1900

# INDEX

	PAGE
Docket entries .....	1a
Complaint for Resisting an Officer .....	2a
Warrant for Resisting an Officer .....	4a
Demand for Transfer to Circuit Court .....	6a
Resisting an Officer .....	7a
Ruling on Motion for Change of Venue .....	8a
Proceedings .....	9a
Judgment Roll #1 .....	10a
Judgment Roll #2 .....	12a
Judgment Roll #3 .....	14a
Judgment Roll #4 .....	16a
Motion .....	18a
Affidavit of James Groppi .....	19a
Findings of Fact and Conclusions of Law .....	20a
Notice of Motion .....	22a
Motion for Change of Venue .....	23a
Affidavit of James E. Groppi .....	24a
Letter Dated October 18, 1967 .....	26a
Notice of Motion .....	28a

	PAGE
Motion to Dismiss .....	29a
Exhibit Annexed to Notice of Motion .....	30a
Notice of Motion .....	32a
Motion for Change of Date .....	33a
Exhibit Annexed to Notice of Motion .....	34a
Notice of Motion .....	36a
Motion to Dismiss .....	37a
Notice of Motion .....	38a
Motion to Dismiss .....	39a
Order to Show Cause .....	42a
Affidavit of Henry W. Maier .....	43a
Exhibit Annexed to Order to Show Cause .....	44a
Exhibit Annexed to Order to Show Cause .....	46a
Certification .....	48a
Defendant's Requested Instructions .....	49a
Verdict .....	50a
Order of the Court, Providing Probation, Etc. ....	51a
Motion After Verdict .....	52a
Exhibit Annexed to Motion .....	54a

	PAGE
Notice of Appeal .....	56a
Transcript of Testimony .....	57a
The Court's Charge .....	175a
Request from Jury for Further Instructions .....	181a
Verdict .....	183a
Hearing on Motion to Accept Affidavit of Prejudice ..	186a
Stipulation With Reference to Approval of Tran- script .....	196a
Certificate of Transmittal .....	198a
Notice of Motion .....	199a
Motion for Rehearing .....	201a
Judgment .....	202a
Remittitur .....	204a
Opinion .....	205a
Dissenting Opinion .....	218a
Concurring Opinion .....	230a
Order Denying Motion for Rehearing .....	232a
Notice of Appeal to the Supreme Court of the United States .....	233a
Certification .....	234a



PO Wilfred Buchanan

ARRESTING OFFICER

PO Armando Brazzoni

ASSISTANT CITY OR DISTRICT ATTORNEY

DATE OF ARREST

9-1-67

8

9

10-9-9-17-18-12

10-19-9-20

BAIL REINSTATEMENT

AMOUNT DATE

3-1-67

DEFENDANT APPEARING IN COURT AND READ

GUILTY

*John Anthony Williams*  
*Calvin F. Taylor*  
*Calvin F. Taylor*  
*Calvin F. Taylor*

CASE CONTINUED FOR CALSICE TRIAL TO

14. 1967 at 8:30 AM

Bond \$1000

September 1, 1967 Surety Bond posted in the amount of \$1000.00 by United States Fidelity and Guaranty Co., Calvin Moody, Agent, received and filed. fk

IT IS ORDERED THAT THE DEFENDANT POSTED BOND IN FULL TO THE CITY OF CHICAGO

SWORN FOR PROBATION TERM

*John and Calvin Taylor with attorney present. The Court will allow the bond to be paid by the State of Illinois and pay for it.*

ACQUIT FOR THE CITY OF CHICAGO

THE COURT AND COURT REPORTER WILL BE PRESENT

CHICAGO, ILLINOIS

CHICAGO, ILLINOIS

CHICAGO, ILLINOIS

Judgment for amount of fine \$

and cost to be taxed, or imprisonment in House of

Correction - Confinement - until said fine and costs are paid or discharged, but such imprisonment shall not

exceed in all days.

TO BE PAID TO THE CITY OF CHICAGO, ILLINOIS

Pay ordered to

1000

SEP 25 1967 Hon. F. Ryan Duffy, Jr. Presiding, Branch 12 County Court Misdemeanor Traffic Division  
Defendant by his attorney, James Spindler, moved for judgment of acquittal. Court granted motion. Case continued to Sept 25, 1967.  
SEP 25 1967 Hon. F. Ryan Duffy, Jr. Presiding, Branch 12 County Court Misdemeanor Traffic Division  
Defendant by his attorney, James Spindler, moved for judgment of acquittal. Court granted motion. Case continued to Sept 25, 1967.

SEP 26 1967 Hon. F. Ryan Duffy, Jr. Presiding, Branch 12 County Court Misdemeanor Traffic Division  
Defendant by his attorney, James Spindler, moved for judgment of acquittal. Court granted motion. Case continued to Sept 26, 1967 at 9 AM B12 -

SEP 26 1967 Hon. F. Ryan Duffy, Jr. Presiding, Branch 12 County Court Misdemeanor Traffic Division  
Defendant by his attorney, James Spindler, moved for judgment of acquittal. Court granted motion. Case continued to Sept 26, 1967 at 9 AM B12 -

OCT 2 1967 Hon. F. Ryan Duffy, Jr. Presiding, Branch 12 County Court Misdemeanor Traffic Division  
Defendant by his attorney, James Spindler, moved for judgment of acquittal. Court granted motion. Case continued to Oct 2, 1967 at 9 AM B12 -

OCT 2 1967 Hon. F. Ryan Duffy, Jr. Presiding, Branch 12 County Court Misdemeanor Traffic Division  
Defendant by his attorney, James Spindler, moved for judgment of acquittal. Court granted motion. Case continued to Oct 2, 1967 at 9 AM B12 -

OCT 6 1967 Hon. F. Ryan Duffy, Jr. Presiding, Branch 12 County Court Misdemeanor Traffic Division  
Defendant by his attorney, James Spindler, moved for judgment of acquittal. Court granted motion. Case continued to Oct 6, 1967 at 9 AM B12 -

*attached to Sept 26, 1967*

SEP 26 1967 Hon. F. Ryan Duffy, Jr. Presiding, Branch 12 County Court Milwaukee Traffic Division  
Defendant by his attorney *James Shallow*  
Court. Notice of Motion received and filed  
and Court set hearing on motion for Oct 2,  
2, 1967 at 9 a.m. Br 12 -

OCT 2 1967 Hon. F. Ryan Duffy, Jr. Presiding, Branch 12 County Court Milwaukee Traffic Division

Defendant by his attorney *James Shallow*  
Court. *John Spindel* ASSISTANT DISTRICT ATTORNEY PRESENT IN COURT FOR THE STATE  
Proposed findings of fact and conclusions of  
law submitted to the Court and was continued  
to October 2, 1967 at 2 P.M. Br 12 -

Same day Hon. F. Ryan Duffy, Jr. Presiding. Defendant in Court by his  
attorneys *James Shallow* and *William Coffey*.  
*John Spindel* ASSISTANT DISTRICT ATTORNEY PRESENT IN COURT FOR THE STATE. Court  
Denied defendants motions for change of  
venue. Case set for trial on October 9, 1967  
at 9:00 AM in Branch 12. ~~(Continued)~~

OCT 6 1967

Hon. F. Ryan Duffy, Jr. Presiding, Branch 12 County Court Milwaukee Traffic Division  
Case called. Defendant not in court. Attorney *James Shallow* asks permission of the Court  
to withdraw as counsel. Motion granted and attorney *James Shallow*'s name stricken from the  
record. Attorney *Thomas Jacobson* appearing as counsel for the defendant and demands a trial  
by jury of twelve and case set for jury trial to October 19, 1967 at 9 a.m. Br. 12 (sub. iss. 7)

OCT 12 1967 Hon. F. Ryan Duffy, Jr. Presiding, Branch 12 County Court Milwaukee Traffic Division  
Demand for transfer to Circuit Court filed in writing by the State of Wisconsin. Pursuant  
to Section 324.17(9), this matter is transferred from the County Court of Milwaukee County to the  
Circuit Court of Milwaukee County and the record and proceedings in this matter are certified to  
the Circuit Court of Milwaukee County, where according to the aforementioned statutes, the  
matter shall be tried and determined as a Circuit Court action. (gm)

OCT. 12, 1967. ALL ORIGINAL PAPERS TRANSFERRED TO CIRCUIT COURT CRIMINAL DIVISION.

**Docket Entries**

**Complaint for Resisting an Officer**

The State of Wisconsin, to the Sheriff, or any Constable of said County, or any Police Officer of the City of Milwaukee:

WHEREAS, Wilfred Buchanan, being first duly sworn on oath, states to the Honorable John J. Kenney, as Magistrate that James Edmund Groppi, the abovenamed defendant on the 31st day of August A.D., 1967, in the County of Milwaukee, Wisconsin, did unlawfully knowingly resist Wilfred Buchanan a duly appointed, qualified and acting police officer of the City of Milwaukee, in said County, while the said Wilfred Buchanan was then and there engaged in doing an act in his official capacity and with lawful authority, to-wit:

said Wilfred Buchanan personally observed said defendant resist Buchanan, at 900 West North Avenue, in the City of Milwaukee, in said County, to-wit: while said defendant was being carried to a police wagon after being placed under arrest, said defendant began kicking his legs, striking said officer Wilfred Buchanan in the body with his foot; that said defendant then states to said Wilfred Buchanan: "You fuckinn' Son of a Bitch, I want your number." contrary to Section 946.41 of the statutes, and against the peace and dignity of the State of Wisconsin, and prays that the said James Edmund Groppi may be arrested and dealt with according to law.

/s/ WILFRED BUCHANAN

3a

*Complaint for Resisting an Officer*

Subscribed and sworn to before me  
this 1st day of September A.D., 1967

/s/ JOHN J. KENNEY  
Magistrate

I hereby find and determine that there is  
probable cause for the issuance of a warrant  
in the above matter.

/s/ JOHN J. KENNEY  
Magistrate

**Warrant for Resisting an Officer**

The State of Wisconsin, to the Sheriff, or any Constable of said County, or any Police Officer of the City of Milwaukee:

WHEREAS, WILFRED BUCHANAN, has this day stated on oath, in writing to the Honorable JOHN J. KENNEY, as Magistrate that JAMES EDMUND GROPPi, the abovenamed defendant on the 31st day of August A.D., 1967, in the County of Milwaukee, Wisconsin, did unlawfully knowingly resist Wilfred Buchanan a duly appointed, qualified and acting police officer of the City of Milwaukee, in said County, while the said Wilfred Buchanan was then and there engaged in doing an act in his official capacity and with lawful authority, to-wit:

said Wilfred Buchanan personally observed said defendant resist Buchanan, at 900 West North Avenue, in the City of Milwaukee, in said County, to-wit: while said defendant was being carried to a police wagon after being placed under arrest, said defendant began kicking his legs, striking said officer Wilfred Buchanan in the body with his foot; that said defendant then states to said Wilfred Buchanan: "You fuckinn' Son of a Bitch, I want your number."

contrary to Section 946.41 of the statutes, and against the peace and dignity of the State of Wisconsin, and prays that the said JAMES EDMUND GROPPi may be arrested and dealt with according to law.

Now, THEREFORE, in the name of the State of Wisconsin, you are commanded forthwith to apprehend the said defendant named above before the County Court of Milwaukee and bring same before the Honorable CHRIST T. SERAPHIM

*Warrant for Resisting an Officer*

Judge, Branch 4 County Court to be dealt with according to law.

WITNESS, the Honorable JOHN J. KENNEY  
Magistrate of the County of Milwaukee, the  
1st day of SEPTEMBER in the year of our Lord  
One Thousand Nine Hundred and Sixty SEVEN.

/s/ JOHN J. KENNEY

Magistrate

**Demand for Transfer to Circuit Court**

(Filed October 12, 1967)

Now comes HUGH R. O'CONNELL, District Attorney of Milwaukee County by JOHN J. SPINDLER, Assistant District Attorney of Milwaukee County, appearing for and on behalf of the plaintiff STATE OF WISCONSIN and sets forth as follows:

1. That the plaintiff STATE OF WISCONSIN is a party to this controversy.

2. That on the 6th day of October, 1967, the defendant demanded a trial by a jury of twelve and that less than ten days have expired from the date of said demand until the filing of this demand for transfer.

Now, THEREFORE, pursuant to sec. 324.17(9) Wisconsin Statutes, the plaintiff demands that the matter be transferred from the County Court of Milwaukee County to the Circuit Court of Milwaukee County and that the Honorable F. Ryan Duffy, Jr., County Court Judge, immediately cause the record and proceedings in this matter to be certified to the Circuit Court of Milwaukee County, where according to the aforementioned statute the matter shall be tried and determined as a Circuit Court action.

Dated at Milwaukee, Wisconsin, this 11th day of OCTOBER, 1967.

HUGH R. O'CONNELL  
District Attorney

JOHN J. SPINDLER  
Assistant District Attorney  
*Attorneys for Plaintiff*

Date of trial:

October 19, 1967, at 9:00 a.m.

**Resisting an Officer**

(Filed October 17, 1967)

I, Raymond W. Fleming, Chief Deputy Clerk of the County Court of the County of Milwaukee, do hereby certify that the foregoing is a correct copy of the record, and of all entries, minutes, orders and proceedings before said County Court on the arrest and examination of the above named defendant; that I have compared the same with the original, and that it is a true transcript therefrom and of the whole thereof.

I further certify that the Complaint, Warrant, Evidence and Recognizances taken before and by said County Court in this matter, and all other papers hereunto annexed, are the originals; and all the papers filed therein, and the same are herewith returned to the Clerk of the Circuit Court of the City and County of Milwaukee, pursuant to law.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County Court at the City of Milwaukee, this 12th day of Oct. A.D. 1967.

/s/ RAYMOND W. FLEMING  
Chief Deputy Clerk of  
Courts, Criminal-Misde-  
meanor-Traffic  
Divisions

By /s/ (Illegible)  
Deputy

**Ruling on Motion for Change of Venue**

(Filed October 3, 1967)

**CHARGE: RESISTING AN OFFICER**

**RULING ON MOTION FOR CHANGE OF VENUE** in the above entitled action rendered on October 2, 1967, by the **HONORABLE F. RYAN DUFFY, Jr.**, County Court Judge.

**APPEARANCES:**

**John J. Spindler**—Assistant District Attorney, appearing for the State of Wisconsin.

**James M. Shellow and William M. Coffey**—Attorneys for Defendant.

Defendant not in Court.

**Howard E. Lutz**—Official Reporter.

### Proceedings

Mr. Shellow: Your Honor, the motion has been made by the defendant for a change in venue on the grounds of community prejudice. It is my understanding that the Court is ready to rule.

The Court: Well, this is the matter of the State of Wisconsin, Plaintiff, vs. Father James E. Groppi; being Case Number 2-63208, scheduled today for a ruling on the motion for a change of venue. Such motion being filed with this Court I believe last Monday, is that not correct?

Mr. Shellow: Yes.

The Court: And was here today for a ruling on those motions, written motions.

So, therefore, the change of venue as asked for in the motion for a change of venue will be denied; it not being provided for in the Wisconsin Statutes.

Also filed with the Court is a Findings of Fact and Conclusions of Law this date for signature of the Court.

And I'll leave that unsigned.

Mr. Shellow: All right. Your Honor, it's my understanding that this motion is being denied because the statute will not permit a change of venue on the grounds of community prejudice and that is the only reason it's being denied?

The Court: No, I'm denying the motion for a change of venue because this is a misdemeanor case and not a felony. And the Wisconsin Statute does not provide for a change of venue in a misdemeanor matter.


Mr. Shellow: Thank you, your Honor.

The Court: Not in a misdemeanor matter; a felony only.

. . . . .

10a

**Judgment Roll #1**

(See Opposite) 

John Laquer 20

Thomas Jacobson

Attys. for Prosecution

Attys. for Defense

THE STATE OF WISCONSIN  
VS.

JAMES EDWARD GROFFI  
1122 W. Clarke

ED 11-16-30

TRANSFER

STATE OF WISCONSIN  
CIRCUIT COURT  
COUNTY OF MILWAUKEE

OFFENSE:

RESISTING AN OFFICER

Oct. 12, 1967

The original complaint, warrant and all other papers in this case  
from the County Court, Milwaukee County, received and filed.

-Information filed, -capias issued, and returned, on same day, by

Deputy Sheriff

October 18, 1967. The Hon. H. J. Steffes Presiding.  
Defendant with Attorney in court. Hear Judge Duffy: Pursuant to Section 253.19,  
I, Herbert J. Steffes, Presiding Judge of Branch 11 of the Circuit Court in and  
for the County of Milwaukee, hereby call upon you to act as a temporary Circuit  
Court Judge to hear, try and determine all of the issues involved in the following  
action herein. Sincerely, H. J. Steffes, Circuit Court Judge, Branch 11. B

OCT 18 1967 *How F. Ryan Duffy to provide as Acting Circuit  
Court Judge. Defendant with his attorney Thomas  
Jacobson in court. Apparent of previous of level  
by the defendant and denied by the court  
and case continued to Oct-19-30. 1967 at 9am Bar.  
for filing of briefs.*

OCT 30 1967 Hon. F. Ryan Duffy, Jr. Presiding, Branch 12 County Court Milwaukee Traffic Division

*Defendant in court with attorney Thomas Jacobson.  
David Cannon ASSISTANT DISTRICT ATTORNEY PRESENT IN COURT FOR THE STATE. Oral argument  
heard by the court. Court ordered to accept the*

Oct. 12, 1967

The original complaint, warrant and all other papers in this case  
from the County Court, Milwaukee County, received and filed.

-Information filed, -capias issued, -and returned, on -same day by

Deputy-Sheriff.

October 18, 1967. The Hon. H. J. Steffes Presiding.  
Defendant with Attorney in court. Dear Judge Duffy: Pursuant to Section 253.19,  
I, Herbert J. Steffes, Presiding Judge of Branch 11 of the Circuit Court in and  
for the County of Milwaukee, hereby call upon you to act as a temporary Circuit  
Court Judge to hear, try and determine all of the issues involved in the following  
action herein. Sincerely, H. J. Steffes, Circuit Court Judge, Branch 11. B

OCT 18 1967 Hon F. Ryan Duffy Defendant with his attorney Thomas  
Court Judge. Defendant with his attorney Thomas  
Johnson in Court. Affiant of previous appeal  
by the defendant and denied by the Court  
and case continued to October 30, 1967 at 9am Bar  
for filing of briefs.

OCT 30 1967

Hon. F. Ryan Duffy, Jr. Presiding, Branch 12 County Court Milwaukee Traffic Division

Defendant in court with attorney Thomas Johnson.

David Cannon ASSISTANT DISTRICT ATTORNEY PRESENT IN COURT FOR THE STATE. Oral arguments  
heard by the Court. Court refused to accept the

Clerk's Fees \_\_\_\_\_

Capias \_\_\_\_\_

Sub. Pros. \_\_\_\_\_

Sub. Def. \_\_\_\_\_

Witness \_\_\_\_\_ Prosecution \_\_\_\_\_ day each

Witness \_\_\_\_\_ Prosecution \_\_\_\_\_ day each

Interpreter \_\_\_\_\_

Attorney Fees \_\_\_\_\_

Pre. ex. costs in County Court \_\_\_\_\_

Amount of Costs as Taxed \_\_\_\_\_

Defendants Affidavit of  
Prejudice. And new lower  
defendant and by his  
attorney files in writing  
a motion for motion and  
motion to Dismiss.  
Court denied defendant's  
motion to Dismiss.  
Court set this case for  
reargument and shall  
motion by the State.

Court set the case for jury trial on November 21, 1967 at 9:00 A.M. (any motions by the State to be submitted to the Court by 11-14-67)

Same Day Defendant's Memorandum Brief and State's Memorandum Brief, in writing, received and filed.

Same Day Defendant's notice of motion and Motion to Dismiss, in writing, received and filed.

NOV 20 1967 Hon. F. Ryan Duffy, Jr. Presiding as Acting Circuit Court Judge. Case called. Defendant by her attorney Thomas Peckham as counsel and by request of defendant's attorney and consent of the defendant District attorney John Lawrence case set for Jury trial to December 11, 1967 at 9 AM 12.

DEC 11 1967 HON. F. RYAN DUFFY, JR. presiding as Acting Circuit Judge. Case called. Defendant with her attorney Thomas Peckham in Court. John Lawrence

Defendant entered a plea of not guilty. Parties thereupon proceeded to imperial as jury as follows, to wit: Floyd Galters, Gerald A. Jones, Russell Ellington, Amelia Powell, Arthur A. Jones, Richard Murphy, John Koster, Richard Hack, Vice, Richard Murphy, Patricia Kramer, Hyndes Carr, Howard Adams, Patricia Kramer, Arlene Brumack. Twelve good and lawful citizens of the City and County of Milwaukee, Wis., qualified to serve as jurors in the above entitled cause and who were duly empanelled and sworn. Jury sworn

Thomas Jefferson in Court and by request of  
Defendant's attorney and consent of the  
District attorney John Lawrence case set for  
jury trial to December 11, 1947 at 9 AM 12.

DEC 11 1947 HON. F. RYAN DUFFY JR. presiding as Acting Circuit  
Judge. Case called. Defendant with his attorney  
Thomas Jefferson in Court. John Lawrence

ASSISTANT DISTRICT ATTORNEY PRESENT IN COURT FOR THE STATE

Defendant entered a plea  
of not guilty. Parties thereupon proceeded to inspect  
a jury as follows, to wit: Floyd Foltz, Gerald  
Schonick, Gerald Ellingson, Amelia Powell, Arthur  
Voss, Richard Murphy, Josef Kauter, Richard Hack  
Nyones Carr, Howard Schenk, Patricia Kramer,  
Arline Benach. Twelve good and lawful citizens  
of the City and County of Milwaukee, Wis., qualified  
to serve as jurors in the above entitled Cause and  
who were duly empanelled and sworn. Jury sworn  
from the Courtroom. Defendants attorney moves for  
a recessed. Motion denied by the Court.

CLERK  
No. C 4718 2-63208  
CIRCUIT COURT  
County of Milwaukee

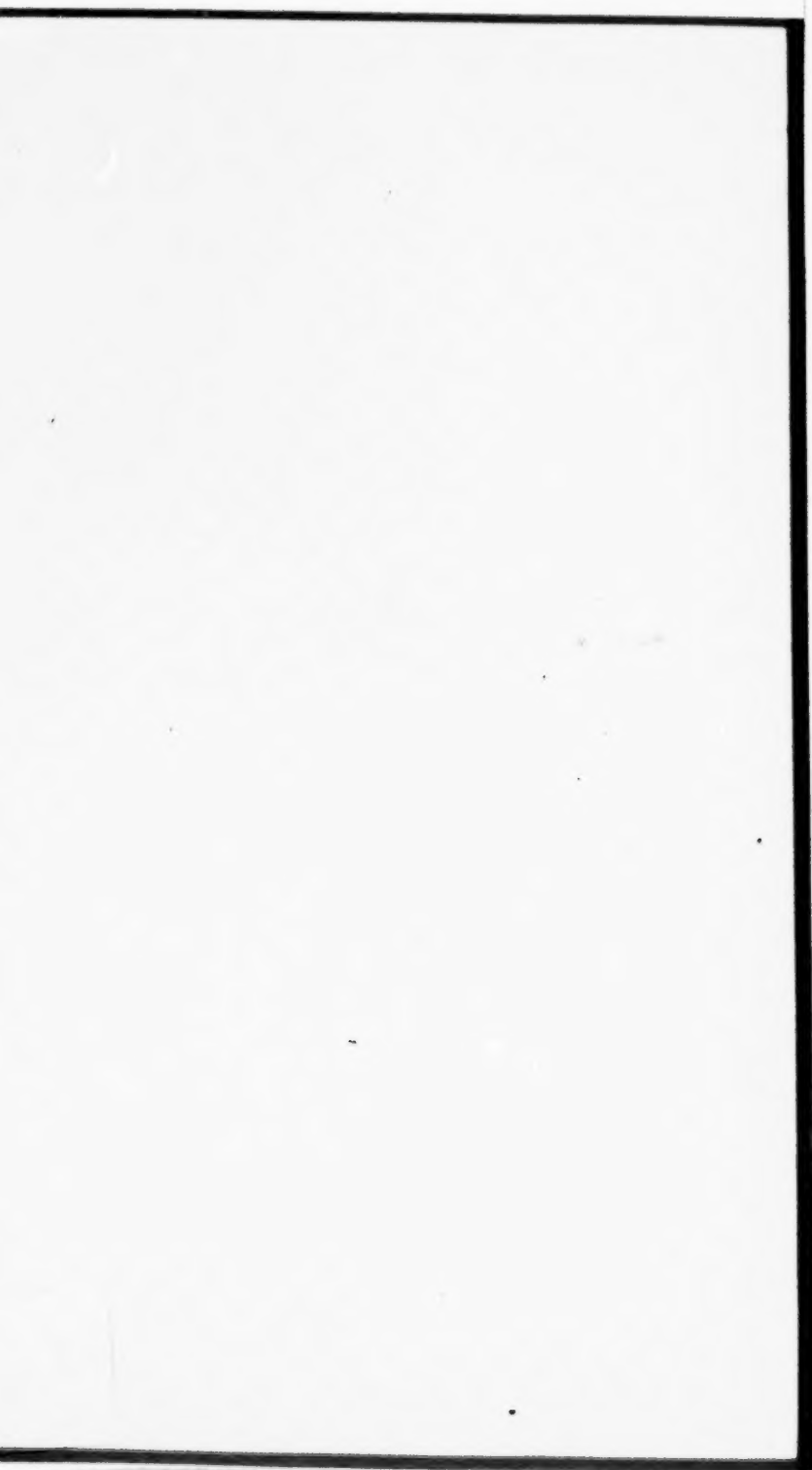
JUDGMENT ROLL

(See Judgment Roll #2)

12a

**Judgment Roll #2**

**(See Opposite) ➡**



THE STATE OF WISCONSIN

VS.

*James Edmund Thompson*

STATE OF WISCONSIN

CIRCUIT COURT

COUNTY OF MILWAUKEE

OFFENSE:

The original complaint, warrant and all other papers in this case from the County Court, Milwaukee County, received and filed. —

Information filed, capias issued and returned on same day by

Deputy Sheriff

*being returned to the Courtroom. Trial proceeded and jury returned; sworn for preliminary Police officers Frank Miller, at this time sworn*

*Harold Ellingson stated to the Court that he was ill and unable to act as a juror in this case because of his illness. Sworn in examined Harold Ellingson. Court declared a mistrial. Court discharged the jury and was returned to January 4, 1968 at 9am P.M.*

*No stipulation of facts, defense counsel and Assistant Attorney John Thompson*

JAN 4 1968 HON. F. ELLAN DUFFY JR. Acting Circuit Court

Information filed, capias issued and returned on same day by

Deputy Sheriff

Jury returned to the Courtroom. Trial proceeded and perjury submitted. Sworn for perjury. Police officer Frank Miller, at this time juror

Ernest Ellingson stated to the Court that he was ill and unable to act as a juror in this case because of his illness. Sworn in. Examined Ernest Ellingson. Court declared a mistrial. Court discharged the jury and was continued to January 4, 1968 at 9am B. 12. No stipulated expenses, defense counsel and Assistant Attorney John Lawrence

JAN 4 1968 HON. F. RYAN DUFFY JR. Acting Court

Presiding: Defendant in court with attorney & James Ellingson

John Lawrence

ASSISTANT DISTRICT ATTORNEY PRESENT IN COURT FOR THE STATE

Grand Juror Ernest Ellingson  
Defendant's attorney  
John Lawrence  
Assistant District Attorney  
John Lawrence

Clerk's Fees			
Capias			
Sub. Pros.			
Sub. Def.			
Witness	Prosecution	day	each
Witness	Prosecution	day	each
Interpreter			
Attorney Fees			
Pre. ex. costs in County Court			
Amount of Costs as Taxed			

12

motions and was continued for four days  
to Wednesday 7, 1933 at 9:00 P.M.

January 12, 1933. Written motion of motion and motions of  
defendants in writing by the defendant through the Attorney  
General Order to show cause and affidavit returned and filed

FEB 1 1933  
FEB 6 1933 MON. F. RYAN DUFFY JR. Acting Circuit Judge Presiding  
Defendant with his attorney Thomas Thompson  
in Court. 1. Notice of Motion to dismiss withdrawn.

2. Motion to subpoena Mayor Mower quashed.

3. Motion of Change of Venue denied.

Parties Thompson proceeded to impanel a jury as follows,  
to wit twelve good and lawful citizens of the City  
and County of Milwaukee, Wisconsin qualified to serve  
as jurors in the above entitled cause and who

were duly impanelled and sworn. Richard Skid  
James Szegura, Rudolph Olson, Charles Heppert-  
Ronald Kruk, William Holz, Florence Lisinski,  
Glen Archer, William Palmer, Susan Walsh,

Richard Wehner, Beatrice Schmidt, alternate jurors

June Balow, Thirteen good and lawful citizens  
of the City and County of Milwaukee, who,

qualified to serve as jurors in the above  
entitled cause and who were duly impanelled

and sworn and were necessary to try at same day.

Parties thereupon proceeded to impanel a jury as follows,  
to-wit twelve good and lawful citizens of the City  
and County of Milwaukee, whose names published to serve  
as jurors in the above entitled cause and who  
were duly impanelled and sworn. Richard Skidell  
James Haganua, Rudolph Olson, Charles Skjerveit-  
Rouald Krueh, William Holz, Florence Liscick,  
Glen Acheson, William Palmer, Susan Malick,  
Richard Wehner, Beatrice Schmidt, alternate jurors  
June Below, thirteen good and lawful citizens  
of the City and County of Milwaukee, who,  
qualified. To serve as jurors in the above  
entitled cause and who were duly impanelled  
and sworn and went recessed to 27 of same day.

CIRCUIT COURT

County of Milwaukee


No. 7

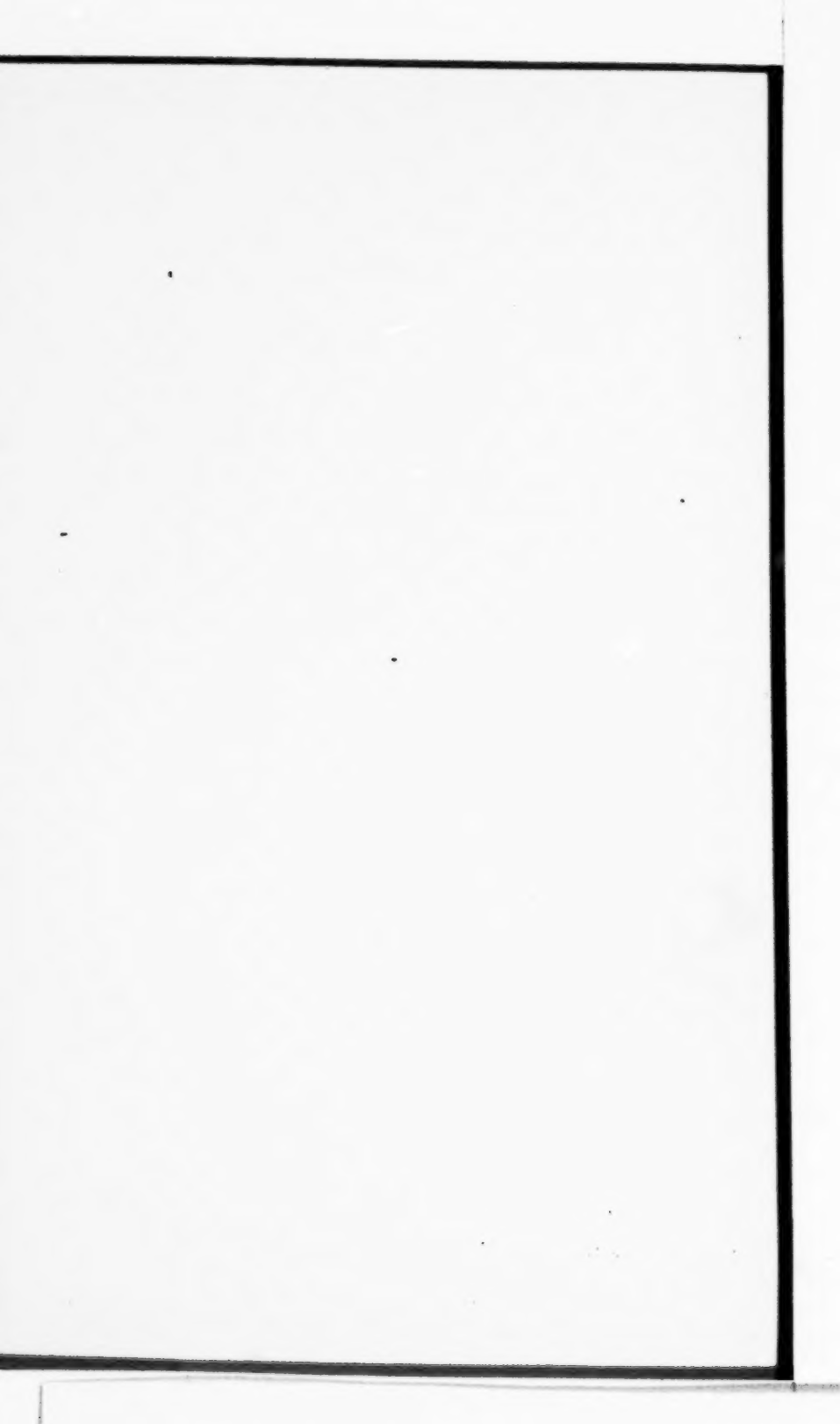
JUDGMENT ROLL

2541-2

14a

**Judgment Roll #3**

(See Opposite) 



THE STATE OF WISCONSIN  
VS.

*James Edmund Gyppe*

STATE OF WISCONSIN  
CIRCUIT COURT  
COUNTY OF MILWAUKEE

OFFENSE:

*Receiving the Offer*

The original complaint, warrant and all other papers in this case  
from the County Court, Milwaukee County, received and filed.

Information filed, capias issued and returned on same day by.

Deputy-Sheriff 2:00 P.M.

FEB 6 1933 MON. F. RYAN DUFFY JR. Acting County Judge Presiding

*Defendant with Attorney Thomas Jackson in Court.*

*John Lawrence Assistant District Attorney in Court for the State.*

*James in the Box. James provided and James submitted.*

*Attained by Assistant District Attorney John Lawrence, jury excused*

*Attained by Assistant Attorney J. Jackson. Stated by Assistant District*

*Attorney J. Lawrence. Jury in the Box. Sum for Prosecution: Deputy Sergeant*

*Ray Allen, Police Officer Frank Miller, jury excused. And sum comes to the*

*defendant and by his attorney. Offers to the Government of the defendant*

*for the Mayor of Milwaukee. Defendant provided. Jury in the Box*

*Recalled for Prosecution. Police Officer Frank Miller. Sum for Prosecution: Police Officer*

*Edward Remlowick, Police Officer Arnold Thompson, Police Officer William*

*Remlowick, Police Officer and Police Officer in the Box.*

The original complaint, warrant and all other papers in this case  
from the County Court, Milwaukee County, received and filed.

Information filed, capias issued and returned on same day by.

Deputy Sheriff 2:00 PM

FEB 9 1933 MON. F. RYAN DUFFY JR. Acting County Judge Presiding

Dependant with Attorney Thomas Jackson in Court.

John Lawrence Assistant District Attorney in Court for the State.

Jury in the Box. Jury provided and jurors returned.

Attended by Assistant District Attorney John Lawrence, jury Excused

Attended by Defendant's Attorney J. Jackson Stained by Assistant District

Attorney J. Lawrence. Jury in the Box. Summon for Prosecution: Deputy Inspector

Ray Collins, Police Officer Frank Miller. Jury excused. And now comes the

Dependant and by his attorney. Refers to the forwarding of the evidence

to the Mayor of Milwaukee. Deposition provided. Jury in the Box

by the Mayor of Milwaukee. Deposition provided. Jury in the Box

Decided for Prosecution. Police Officer Frank Miller. Police Officer William

Adams. Defendant. Police Officer William Duggan. Police Officer William

At 8:30 AM.

FEB 9 1933 MON. F. RYAN DUFFY JR. Acting County Judge Presiding

Dependant with Attorney John Lawrence in Court.

John Lawrence

In the absence of the State

defendant's attorney, moved

that such case be dismissed

without prejudice. Jury with

to the Courtroom.

Clerk's Fees

Capias

Sub. Pros.

Sub. Def.

Witness Prosecution day each

Witness Prosecution day each

Interpreter

Attorney Fees

Pre. ex. costs in County Court

Print of Costs as Taxed

Cassidy, Charles Morgan, Mike Connelley,  
Michael Culley, Treva McManey. Defense  
rest. Recalled for prosecution Police Officer  
Armando Bazzoni, Recalled for Prosecution Police  
Officer Wilfred Buchanan. Still rests. Defense rests.  
Jury opened from the courtroom. Defendants' <sup>7:44</sup>  
requested instructions received and filed.  
Jury returned to the courtroom. Testimony closed.  
Cassidy argued by Counsel and submitted. Court  
charged the jury who at the hour of 4:55 PM - the jury  
deliberate in charge of Deputy Sheriff Henry Lee  
and Estelle Hartidge. Note: were first duly  
sworn for that purpose, and afterwards to wit  
on the same day at the hour of 4:55 PM - the jury  
returned and by their foreman, Ronald Krueh  
brought in a verdict as follows, to wit: We  
the jury find the defendant James Edward  
Kropper guilty in manner and form as charged  
in the complaint, Ronald Krueh foreman.  
Dated at Milwaukee Wisconsin this 9th day of  
February A.D. 1968. Verdict received and recorded.  
One motion of defendant's attorney Thomas Preston  
Court polled the jury by asking each and every  
juror the following question, 'Was this and is  
it now ever what? to which each and every

Cadise argued by counsel and charged the jury who at the hour of 4:15 PM. Lee deliberate in charge of Deputy Sheriff Henry Lee and Estelle Hartidge who were first duly sworn for that purpose, and afterwards to wit on the same day at the hour of 4:55 PM - The jury returned and by their foreman, Rowald Krueh brought in a verdict as follows, to wit "We the jury find the defendant James Lawrence Kropp guilty in manner and form as charged in the complaint, Rowald Krueh foreman. This 9th day of Dated at Milwaukee Wisconsin. This 9th day of February A.D. 1968. Verdict received and recorded.

February A.D. 1968. Verdict received and recorded. The motion of defendant's attorney Thomas Peterson Court polled the jury by asking each and every juror the following question, "Was this and is this now your verdict? to which each and every juror answered in the affirmative. Jury discharged and Court with-did continue to February 12,

1968 at 9 AM P. 12.

CIRCUIT COURT


County of Milwaukee

JUDGMENT ROLL

The Judgment Roll # 4

16a

**Judgment Roll #4**

(See Opposite) 

THE STATE OF WISCONSIN  
VS.

STATE OF WISCONSIN  
CIRCUIT COURT  
COUNTY OF MILWAUKEE

James Edmund Grogan

Resting on Offer

OFFENSE:

The original complaint, warrant and all other papers in this case  
from the County Court, Milwaukee County, received and filed.

Information filed, copies issued and returned on same day by

Deputy Sheriff

FEB 12 1907 MON. F. RYAN DUFFY JR. Acting Circuit Court Judge Presiding

Defendant with his attorney, Thomas Jackson  
me. Court. John Lawrence, Assistant District Attorney Present in Court for the State.  
motions after verdict received and filed and  
denied by the Court.

Defendant found guilty and sentenced to pay a fine of \$ 500 ~  
and the costs or ~~at least~~ <sup>at least</sup> House of Correction.  
Court allowed defendant until 2-13-  
1907 to pay the fine and costs.

And in addition that defendant sentenced  
to the House of Correction for a term of six months.  
Court stayed sentence for two years and placed  
defendant on probation for said period.

Clerk's Fees

James Edm. F. RYAN DUFFY JR.  
that in

Deputy Sheriff

Information filed, capias issued and returned on same day by

FEB 12 1903 MON. F. RYAN DUFFY JR. Acting Circuit Court Judge Presiding  
Defendant with his attorney, Thomas Jackson  
in Court. John Lawrence, Assistant District Attorney Present in Court for the State  
motions after verdict received and filed and  
denied by the Court.

Defendant found guilty and sentenced to pay a fine of \$ 500 ~  
and the costs or ~~at~~ <sup>at</sup> ~~the~~ <sup>the</sup> House of Correction.  
Court allowed defendant until 2-13-  
1903 to pay the fine and costs.

And in addition that defendant sentence  
to the House of Correction for a term of six months.  
Court stayed sentence for two years and placed  
defendant on probation for said period.

Clerk's Fees	
Capias	
Sub. Pros.	
Sub. Def.	
Witness	Prosecution day each
Witness	Prosecution day each
Interpreter	
Attorney Fees	
Pre. ex. costs in County Court	
Amount of Costs as Taxed	

Same day, F. RYAN DUFFY JR.  
Judge Presiding  
Defendant by his attorney  
Thomas Jackson in Court.  
Notice of Appeal and  
Application of Bail  
Filed from the Circuit  
Court Criminal Division  
Multnomah County, Oregon  
to the District Court  
of the State of Oregon  
for review of the judgment.

**Motion**

(Filed September 14, 1967)

Now comes the defendant in the above-entitled cause by his attorneys SHELLLOW, SHELLLOW & COFFEY, and, upon all of the files, records and proceedings heretofore had herein and upon the affidavit submitted *infra*, respectfully moves this Court for an order changing the venue of this cause to another judge and another county where the prejudice complained of does not exist.

Respectfully submitted,

FR. JAMES GROPPI

BY: SHELLLOW, SHELLLOW & COFFEY

**Affidavit of James Groppi**

(Filed September 7, 1967)

STATE OF WISCONSIN,  
MILWAUKEE COUNTY, ss.:

JAMES GROPPi, being first duly sworn on oath, deposes and says, that he is the defendant in the above-entitled cause; that he has reason to believe and does believe that he cannot receive a fair and impartial trial before the Honorable Christ T. Seraphim, County Judge, nor in the County of Milwaukee, and makes this affidavit in support of his motion to change the venue of this cause to another judge and another county where the prejudice complained of does not exist.

/s/ FR. JAMES E. GROPPi

Subscribed and sworn to before me this  
14th day of September, 1967.

/s/ (*Illegible*)

Notary public, Milwaukee Cty., Wis.  
My commission is permanent.

### **Findings of Fact and Conclusions of Law**

The defendant stands charged with a violation of Sec. 946.41 (1) Wis. Stat.—Resisting an Officer. The offense charged is a misdemeanor. The defendant has moved this Court for a change of venue to another county and in support of this motion has asserted that massive news coverage of his activities will preclude a fair and impartial trial in Milwaukee County.

The Court finds the following as facts:

1. During the past six months there has been extensive and continuous news coverage of the activities of this defendant. This news coverage has been in newspapers of general circulation in the community, on radio and on television; the activities of the defendant have been the subject of editorial comment.
2. As a consequence of the aforesaid news coverage, the defendant is the most controversial public figure in Milwaukee County.
3. As a consequence of the aforesaid news coverage, the defendant is the subject of extensive discussion throughout the community and most persons have expressed views concerning his conduct.

The Court concludes as a matter of law:

1. The defendant will not be able to obtain a fair and impartial trial at this time in Milwaukee County.
2. In considering the motion of the defendant for a change in venue this Court is bound by the provisions of Sec. 956.03(3) Wis. Stat.
3. The provisions of Sec. 956.03(3) Wis. Stat. permit a change of venue on the grounds of community prejudice only in felony prosecutions.

*Findings of Fact and Conclusions of Law*

4. This Court is without power to grant a motion for a change of venue on grounds of community prejudice.

IT IS ORDERED that the defendant's motion for a change of venue be and hereby is denied.

Dated at Milwaukee, Wisconsin, this ..... day of October, 1967.

BY THE COURT:

.....

**Notice of Motion**

(Filed September 26, 1967)

To:

HUGH R. O'CONNELL, Esq.  
District Attorney  
Milwaukee County  
Safety Building  
Milwaukee, Wisconsin

PLEASE TAKE NOTICE that on the 2nd day of October, 1967 at 9:00 o'clock in the forenoon or as soon thereafter as counsel may be heard, the undersigned will bring on for hearing before the Honorable F. RYAN DUFFY, JR., County Judge, a motion to change the venue of this cause, a true copy of which is hereto annexed.

Dated at Milwaukee, Wisconsin this 25th day of September, 1967.

SHELLOW, SHELLOW & COFFEY  
*Attorneys for Defendant*

P. O. ADDRESS  
660 East Mason Street  
Milwaukee, Wisconsin 53202  
271-8535

### **Motion for Change of Venue**

Now comes the above-named defendant, Fr. James E. Groppi, by SHELLLOW, SHELLLOW & COFFEY, his attorneys, and moves this Court for an order changing the venue of this prosecution to a county where community prejudice against this defendant does not exist and where an impartial jury trial can be had.

That said motion is based upon all the records, files and proceedings heretofore had in this action and upon the affidavit of defendant hereto annexed.

As a further basis for said motion, defendant requests that this Court take judicial notice of the massive coverage by all news media in this community of the activities of this defendant and such activities as have been related to him, or, in the alternative, that the defendant be permitted to offer proof of the nature and extent thereof, its effect upon this community and on the right of defendant to an impartial jury trial.

Respectfully submitted,

FR. JAMES E. GROPPi

By: (Illegible)

SHELLLOW, SHELLLOW & COFFEY  
*Attorneys for Defendant*

**Affidavit of James E. Groppi**

STATE OF WISCONSIN,  
MILWAUKEE COUNTY, SS.:

FR. JAMES E. GROPP, being first duly sworn, on oath, deposes and says:

1. That he is the defendant in the above-entitled action; that this affidavit is made in support of defendant's motion to change the venue of the prosecution of this cause.
2. That affiant has fully and fairly stated the case in this action to James M. Shellow, his attorney, who resides in the City and County of Milwaukee, Wisconsin, and that, upon such statement thus made, affiant is advised by his said counsel and verily believes that he has a valid and substantial defense to said prosecution, upon the merits, and to the whole thereof.
3. That an impartial jury trial of this prosecution can not be had in Milwaukee County in which this action is pending, as this affiant has reason to believe and does verily believe; and that the reasons and grounds of his belief are as follows:
  - a. That affiant has been active in this County in support of the efforts of Negro citizens to obtain civil rights.
  - b. That affiant is the advisor to the Youth Council of the Milwaukee Chapter of the National Association for the Advancement of Colored People, which said Youth Council has been active in this County in the same area.
  - c. That the activities and actions of affiant and said Youth Council have received massive and frequently ad-

*Affidavit of James E. Groppi*

verse news coverage and publicity by all of the news media in Milwaukee County.

d. That some of said news media have published editorial criticism of the activities of affiant and said Youth Council, thereby further arousing community prejudice.

e. That by reason thereof and by reason of the feelings and prejudices engendered thereby, community prejudice against affiant exists in Milwaukee County sufficient to make it impossible for affiant to have a fair and impartial jury trial in said County, as guaranteed to him by the Sixth and Fourteenth Amendments to the United States Constitution.

FR. JAMES E. GROPPi

Fr. James E. Groppi

(Sworn to September 26, 1967.)

**Letter Dated October 18, 1967**

CIRCUIT COURT CHAMBERS  
Branch 11 Second Judicial Circuit  
Criminal Court Branch  
Safety Building  
Milwaukee, Wisconsin 53233

HERBERT J. STEFFES  
Senior Judge  
Criminal Court Branches

October 18, 1967

Hon. F. Ryan Duffy, Jr.  
County Court Judge, Br. 12  
Misdemeanor—Traffic Division  
Safety Building  
Milwaukee, Wisconsin

Dear Judge Duffy:

Pursuant to Section 253.19, I, Herbert J. Steffes, Presiding Judge of Branch 11 of the Circuit Court in and for the County of Milwaukee, hereby call upon you to act as a temporary Circuit Court Judge to hear, try and determine all of the issues involved in the following action:

27a

*Letter Dated October 18, 1967*

STATE OF WISCONSIN VS JAMES EDMUND GROPP

County Court No. 2-63208, and Circuit Court No. G-4718;

RESISTING AN OFFICER, Section 946.41.

Sincerely,

H. J. STEFFES,

H. J. Steffes,

Circuit Judge, Branch 11

HJS:bmd

cc: Hon. Robert W. Hansen,  
Chairman, County Board  
of Judges  
Thomas Jacobson for  
Defendant

**Notice of Motion**

**BARBEE AND JACOBSON**  
Attorneys at Law

To:

**HUGH O'CONNELL**  
District Attorney  
Safety Building  
Milwaukee, Wisconsin

PLEASE TAKE NOTICE that on the 30th day of October, 1967, at 2:15 o'clock in the afternoon, or as soon thereafter as counsel may be heard, we shall appear before the Honorable F. Ryan Duffy, Jr., Judge of the Circuit Court, in his courtroom, of the Milwaukee County Safety Building at Milwaukee, Wisconsin, and shall present the motion, true copy of which is attached hereto.

Dated at Milwaukee, Wisconsin, this 30th day of October, 1967.

**BARBEE & JACOBSON**  
*Attorneys for Defendant*  
110 East Wisconsin Avenue  
Milwaukee, Wisconsin 53202

**Motion to Dismiss**

Now comes the above named defendant in the above entitled action and moves to dismiss, and for grounds to dismiss says:

1. That the Court lacks jurisdiction over the defendant in that Section 324.17(9), Wisconsin Statutes, whereunder the instant case has been transferred from Milwaukee County Court to the present Court sitting as an acting Circuit Court, is unconstitutional in its application to the present case before said Court in that said defendant's rights under the Fourteenth Amendment, United States Constitution, is violated thereby.

Dated at Milwaukee, Wisconsin, this 30th day of October, 1967.


BARBEE & JACOBSON

*Attorneys for Defendant*

110 East Wisconsin Avenue  
Milwaukee, Wisconsin 53202

30a

**Exhibit Annexed to Notice of Motion**

(See Opposite) 

James Edmund Grogan

G-4718

RECEIVED  
DEC 1 1967

F. RYAN DUFFY, JR.  
COUNTY JUDGE, BRANCH 12  
MILWAUKEE COUNTY, WIS.

- ① Floyd Pottier
- ② Kenneth Cheek, STATE #3
- ③ Gerald Schenck
- ④ Barbara Murdoch STATE #3
- ⑤ Helen Ludwig STATE #1
- ⑥ Gerald Ellingson
- ⑦ James / Parvulston STATE #4
- ⑧ Fernaei May Bryan DEFENSE #2
- ⑨ Cecilia Powell
- ⑩ Arthur Mae
- ⑪ Richard Murphy
- ⑫ Jerry Kempf DEFENSE #1
- ⑬ John Kastrup
- ⑭ Richard Gaeck
- ⑮ Hardy Carr
- ⑯ 3/20/63 - Peter Perry DEFENSE #4
- ⑰ Howard Schenck
- ⑱ Mildred Prohant DEFENSE #3
- ⑳ Victoria Kraemer
- ㉑ Arlene Barack

**Notice of Motion**

To: HUGH O'CONNELL  
District Attorney  
Safety Building  
Milwaukee, Wisconsin

PLEASE TAKE NOTICE that on the 4th day of January, 1968, at 9:00 o'clock in the forenoon, or as soon thereafter as counsel may be heard, we shall appear before the Honorable F. Ryan Duffy, Jr., Judge of the Circuit Court, in his courtroom, of the Milwaukee County Safety Building at Milwaukee, Wisconsin, and shall present the motion, true copy of which is attached hereto.

Dated at Milwaukee, Wisconsin, this 4th day of January, 1968.

BARBEE & JACOBSON  
*Attorneys for Defendant*  
110 East Wisconsin Avenue  
Milwaukee, Wisconsin 53202

**Motion for Change of Date**

Now comes the above named defendant in the above entitled action and moves the Court for a change of venue, and for grounds for change of venue says:

1. The attached articles from the Milwaukee Journal, December 11, 1967 and the Milwaukee Sentinel, December 12, 1967 relating to the Court's granting defendant's counsel Motion for Mistrial; upon information and belief the present jury panel is the same jury empaneled to hear the aforesaid proceedings and now is prejudiced so that defendant cannot receive a fair and impartial hearing on the re-trial before the same jury panel.


BARBEE & JACOBSON

*Attorneys for Defendant*

110 East Wisconsin Avenue  
Milwaukee, Wisconsin 53202

34a

**Exhibit Annexed to Notice of Motion**

(See Opposite) 

## Mistrial Declared in Father Groppi Case

An attorney for Father the mayor's proclamation, banning Father Groppi, who is in the night-time marches. He charged with resisting arrest was participating in an open house demonstration. asked for a mistrial Monday. Police accused him of becoming because the prosecuting profane and kicking the arresting attorney had refused to arrest officer. He has pleaded that the only two Negroes on a not guilty.

County Judge F. Ryan Duffy, Jr., denied that Father Groppi was being denied his constitutional right to be tried the motion.

Atty. Thomas Jacobson moved that a mistrial be declared after an all-white jury of four women and eight men was selected before Duffy.

Father Groppi, adviser to the NAACP youth council, is accused of resisting arrest in connection with an incident August 31 in the 900 block of W. North av.

He was among about 30 people arrested then for violating their race.

### Part 2

Tuesday, December 12, 1967

## Father Groppi Case Declared a Mistrial

County Judge F. Ryan Duffy, calendar Tuesday, the judge declared a mistrial and adjourned in the case of Father James E. Groppi, charged with resisting arrest.

A juror, Gerald Ellingson, 2104 S. 92nd st., West Allis, told the judge he was ill. Father Groppi's lawyer, Atty. Thomas Jacobson refused to agree to a trial with only 11 jurors.

Because of a crowded court, Father Groppi, adviser to the NAACP youth council, is accused of resisting arrest in connection with an incident August 31 in the 900 block of W. North av.

He was among about 30 people arrested then for violating the mayor's proclamation banning night-time marches. He was participating in an open housing demonstration.

### Juror Ill,

## Groppi Case Mistrial Ruled

A mistrial was declared Monday in the circuit court case of Father James E. Groppi when one of the 12 jurors became ill minutes after testimony started.

No alternate jurors had been named.

Father Groppi had been charged with resisting arrest.

County Judge F. Ryan Duffy, Jr., sitting as a circuit judge, declared the mistrial after Defense Atty. Thomas Jacobson refused to continue with only 11 jurors.

Earlier, Duffy had denied a motion for a mistrial by Jacobson on the ground that John H. Laueran, an assistant district attorney, had refused to seat the only two Negroes on a 20 member jury panel.

Wisconsin law gives circuit judges the option of naming a 13th juror as an alternate, but a court source called it "highly unusual" to name an alternate in a misdemeanor case.

After declaring the mistrial and rescheduling the trial for Jan. 4, Duffy remarked to a reporter: "I've had 150 jury trials since I've been on the bench, and this is the first time a juror has been sick."

"But next time, I'll pick 13." Father Groppi, adviser to the Milwaukee youth council of the National Association for the Advancement of Colored People (NAACP), was among 134 persons arrested during an open housing march in the 900 block of W. North av. on Aug. 31.

Patrolman Wilfred G. Buchanan accused the priest of kicking him while he was being carried to a patrol wagon for violating a ban against night-time marches imposed by Mayor Maier.

Police Sgt. Frank Miller was being questioned by Laueran when the ailing juror — Gerald J. Ellingson, 37, of 2104 S. 92nd st., West Allis — complained of feeling ill and asked

ple arrested then for violating laws because of their race.

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## Father Groppi Case Declared a Mistrial

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A juror, Gerald Ellingson, 2104 S. 92nd st., West Allis, told the judge he was ill. Father Groppi's lawyer, Atty. Thomas Jacobson refused to agree to a trial with only 11 jurors.

Because of a crowded court

Father Groppi, advisor to the NAACP youth council, is accused of resisting arrest in connection with an incident Aug. 31 in the 900 block of W. North av.

He was among about 30 people arrested then for violating the mayor's proclamation banning nighttime marches. He was participating in an open housing demonstration.

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Wisconsin law gives circuit judges the option of naming a 13th juror as an alternate, but a court source called it "highly unusual" to name an alternate in a misdemeanor case.

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"But next time, I'll pick 13."

Father Groppi, advisor to the Milwaukee youth council of the National Association for the Advancement of Colored People (NAACP), was among 134 persons arrested during an open housing march in the 900 block of W. North av. on Aug. 31.

Patrolman Wilfred G. Buchanan accused the priest of kicking him while he was being carried to a patrol wagon for violating a ban against nighttime marches imposed by Mayor Maier.

Police Sgt. Frank Miller was being questioned by Lauerman when the ailing juror — Gerald J. Ellingson, 37, of 2104 S. 92nd st., West Allis — complained of feeling ill and asked permission to go to a rest room.

Duffy recessed the proceedings. When Ellingson still felt ill 15 minutes later, and said he

MILWAUKEE SENTINEL

MISTRIAL

Claims Right  
Denied Groppi

Continued From Page 1

may have contracted the illness from his adviser, Duffy declared the mistrial and 11 jurors were released.

In requesting a retrial, Groppi said the state should pay the 13th juror's expenses. He also requested that the state pay the expenses of the 11 jurors.

**Notice of Motion**

To: HUGH O'CONNELL  
District Attorney  
Safety Building  
Milwaukee, Wisconsin

PLEASE TAKE NOTICE that on the 8th day of February, 1968, at 9:00 o'clock in the forenoon, or as soon thereafter as counsel may be heard, we shall appear before the Honorable F. Ryan Duffy, Jr., Judge of the Circuit Court, in his courtroom, of the Milwaukee County Safety Building at Milwaukee, Wisconsin, and shall present the motion, true copy of which is attached hereto.

Dated at Milwaukee, Wisconsin, this 10th day of January, 1968.

BARBEE & JACOBSON  
*Attorneys for Defendant*  
110 East Wisconsin Avenue  
Milwaukee, Wisconsin 53202

**Motion to Dismiss**

Now comes the above named defendant in the above entitled action and moves to dismiss, and for grounds to dismiss says:

1. Section 956.03(3) Wisconsin Statutes is unconstitutional on its face and as applied in that prejudice in the community is not lessened just because defendant is charged with a felony as opposed to a misdemeanor; the legal harm said statute attempts to correct is the fact community prejudice prevents defendant in a criminal proceeding before a jury from obtaining a fair and impartial trial.

2. The present matter is a misdemeanor transferred to the Circuit Court by the Milwaukee County District Attorney and assigned to the Honorable F. Ryan Duffy to sit as an acting Circuit Court Judge.

Dated at Milwaukee, Wisconsin, this 10th day of January, 1968.

**BARBEE & JACOBSON**

*Attorneys for Defendant*

110 East Wisconsin Avenue  
Milwaukee, Wisconsin 53202

**Notice of Motion**

PLEASE TAKE NOTICE that on the 8th day of February, 1968, at 9:00 o'clock in the forenoon, or as soon thereafter as counsel may be heard, we shall appear before the Honorable F. Ryan Duffy, Jr., Judge of the Circuit Court, in his courtroom, of the Milwaukee County Safety Building at Milwaukee, Wisconsin, and shall present the motion, true copy of which is attached hereto.

Dated at Milwaukee, Wisconsin, this 10th day of January, 1968.

**BARBEE & JACOBSON**

*Attorneys for Defendant*

110 East Wisconsin Avenue  
Milwaukee, Wisconsin 53202

### **Motion to Dismiss**

Now comes the above named defendant in the above entitled action and moves to dismiss, and for grounds to dismiss says:

1. The proclamation of Mayor Henry Maier dated August 30, 1967 which formed the basis for defendant's arrest herein is unconstitutional on its face in that it violates defendant's rights of freedom of speech, assembly, and the right to petition his government for a redress of grievances under the First and Fourteenth Amendments to the United States Constitution.

2. The proclamation of Mayor Henry Maier is unconstitutional as applied to the defendant's conduct, in that it violates defendant's rights under the First and Fourteenth Amendments to the United States Constitution.

3. The proclamation of Mayor Henry Maier is unconstitutional on its face and as applied in that it is vague, uncertain and fails to establish any ascertainable standard of guilt contrary to the due process clause of the Fourteenth to the United States Constitution.

4. The proclamation of Mayor Henry Maier is unconstitutional on its face and as applied in that it is overbroad and encompasses within its coverage activity which is clearly protected by the guarantees of the First Amendment to the Constitution of the United States, contrary to the due process clause of the Fourteenth Amendment to the United States Constitution. The proclamation permits and encourages executive or judicial officials to discriminate against defendant by reason of racial identification or of political beliefs and ideas, and to intimidate and harass by

*Motion to Dismiss*

arrest, detention, brutality, excessive bail, and prosecution or the threat thereof, defendant in the exercise of his rights of free speech, assembly, association and petitioning his government for redress of grievances, to express unpopular or unorthodox views on public issues of vital concern or to protest and oppose certain policies of the United States, the State of Wisconsin or the City of Milwaukee on vital public issues, contrary to the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

5. The proclamation of Mayor Henry Maier is unconstitutional as applied to defendant and as applied violates defendant's rights under the First and Fourteenth to the United States Constitution.

6. The arrest under the proclamation of Mayor Henry Maier is basically for the unlawful purpose of depriving defendant of his rights of freedom of speech, assembly, association and petitioning his government for a redress of grievances guaranteed by the First and Fourteenth Amendments to the United States Constitution. Further enforcement of the present charges based on defendant's invalid arrest pursuant to the proclamation of Mayor Henry Maier will have the effect of punishing defendant now threatened with prosecution for the exercise of rights, privileges and immunities secured to him by the Constitution and laws of the United States; has and will deter defendant from the future exercise of his rights, privileges and immunities; has encouraged and will encourage the State, County and/or local officials acting under color of law, to engage in further acts of intimidation, harassment, threats of violence, threats of arrest, and other actions

*Motion to Dismiss*

meant to prevent and deter defendant from the exercise of his rights, privileges and immunities.

7. The arrest and attempted prosecution has been and is being carried on with the basic purpose and effect of intimidating and harassing defendant and punishing him for and deterring him from exercise of his constitutionally protected rights of free speech and assembly and association to:

1. Oppose and protest the policies of the United States Government, the State of Wisconsin, County of Milwaukee, and City of Milwaukee, with regard to segregation and racial discrimination against Negroes, including, but not limited to, discrimination in the purchase, lease, rental or sale of housing.
2. Or otherwise publicly express unpopular and unorthodox views on public issues of vital concern.

Dated at Milwaukee, Wisconsin, this 10th day of January, 1968.

BARBEE & JACOBSON

*Attorneys for Defendant*

110 East Wisconsin Avenue  
Milwaukee, Wisconsin 53202

**Order to Show Cause**

(Filed February 7, 1968)

UPON THE reading and filing of the affidavit affixed hereto and on motion of John J. Fleming, City Attorney, by John F. Kitzke and Thomas E. Hays, Assistant City Attorneys,

IT IS ORDERED that the defendant by his attorney, Thomas M. Jacobson, appear before the Honorable E. Ryan Duffy, Jr., Judge of County Court, Branch 12, in his courtroom in the Safety Building, on the 7 day of February, 1968, at 4 o'clock, P.M. or as soon thereafter as counsel can be heard to show cause why the subpoena heretofore issued on behalf of the defendant and ordering the appearance of Henry W. Maier, Mayor of the City of Milwaukee before this court in the above entitled action on February 8, 1968 at 3:00 o'clock p.m. should not be quashed.

IT IS FURTHER ORDERED that a copy of this order to show cause and the affixed affidavit be served on the defendant's counsel, Thomas M. Jacobson, 110 E. Wisconsin Avenue, not less than 1 hour prior to the time set for hearing.

Dated at Milwaukee, Wisconsin, this 7 day of February, 1968.

BY THE COURT,

F. RYAN DUFFY, JR.

F. Ryan Duffy, Jr., Judge.

**Affidavit of Henry W. Maier**

STATE OF WISCONSIN,  
MILWAUKEE COUNTY, SS.:

HENRY W. MAIER, being first duly sworn on oath, deposes and says:

1. That at all times herein mentioned he was and is the Mayor of the City of Milwaukee.

2. That at approximately 9:15 a.m., February 7, 1968, he was served with a subpoena to appear before the Judge of County Court, Branch 12, on February 8, 1968, at 3:00 o'clock p.m. in the above entitled action.

3. That on information and belief such action constitutes a prosecution by the State of Wisconsin of the defendant for violation of Section 946.41 of the Wisconsin Statutes (resisting or obstructing an officer) and that such alleged offense took place on the 31st day of August, 1967, at approximately 8:40 o'clock p.m. at or about North 9th Street and West North Avenue in the city and county of Milwaukee, State of Wisconsin.

4. That the affiant was nowhere in the vicinity of the aforesaid arrest at or about said time and has no personal knowledge whatsoever of any of the facts or circumstances surrounding the same.

5. That the affiant verily believes that there are no facts or information within his knowledge to which he could testify or in anyway assist the Court in arriving at its decision.

*Affidavit of Henry W. Maier*

6. That the affiant is engaged in many and sundry matters of great importance to the citizens, taxpayers and general public of the City of Milwaukee in his capacity as Mayor and it is for that reason this affidavit is made for the purpose of obtaining an order to show cause why the aforementioned subpoena should not be quashed.

HENRY W. MAIER  
Henry W. Maier

Subscribed and sworn to before me  
this 7th day of February, 1968.


(Illegible)

Notary Public, Milwaukee County, Wis.

My commission expires: January 25, 1970.

---

**Exhibit Annexed to Order to Show Cause**

(See Opposite) 



James Edward Groppe

6-4718

RECEIVED  
FEB 3 - 1968  
J. RYAN DUFFY, JR.  
COUNTY JUDGE, BRANCH 13  
TULWADORE COUNTY, WIS.

- ① Esther Trojanic House #1  
② Richard Heidl  
③ Norbert Penster House #1  
④ James Sazama  
⑤ Rudolph Olson  
⑥ Charles Hoppert  
⑦ Ronald Kruk  
⑧ William Holz  
⑨ Robert Conrad State #1  
⑩ Eugene Lesiak  
⑪ Susan Hendrickson House #1  
⑫ Roland Schlederer House #3  
⑬ Glen Arnes  
⑭ Gerald Patton State #2  
⑮ William Palmer  
⑯ Joseph Beckel State #4  
⑰ Susan Malach  
⑱ Richard Wahner  
⑲ Beatrice Schind  
⑳ Harry Prover State #3

Alternate Suror

- { Charlotte Walstrom State #1  
Jung Balow  
Robert Grot State #1

**Exhibit Annexed to Order to Show Cause****PROCLAMATION**

WHEREAS, on the night of August 28, 1967, disturbances occurred in the City of Milwaukee arising out of certain parades, marches and demonstrations within the City of Milwaukee; and

WHEREAS, on Tuesday, August 29, 1967, further disturbances existed within the City of Milwaukee resulting from parades, marches and demonstrations; and

WHEREAS, the foregoing have resulted in civil commotion and disturbance detrimental to the maintenance of public order endangering life, damaging property, impairing transportation and interfering with police and fire protection and other vital services of the City of Milwaukee; and

WHEREAS, such disturbances are likely to continue and present an increasing and imminent danger to the public health, safety and welfare of the City of Milwaukee;

NOW, THEREFORE, pursuant to the power vested in me by the Laws of the State of Wisconsin and the Ordinances of the City of Milwaukee, and upon finding that an emergency exists within the City of Milwaukee and will continue to exist therein presenting a clear and present danger to the health, safety, welfare and good order of the citizens of the City of Milwaukee and their property, and a reasonable limitation upon marches, demonstrations, parades and other similar activities is necessary and expedient;

*Exhibit Annexed to Order to Show Cause*

I DO HEREBY PROCLAIM AND ORDER AS FOLLOWS:

1. That marches, parades, demonstrations, or other similar activities are prohibited upon all public highways, sidewalks, streets, alleys, parks and all other public ways and public grounds within the City of Milwaukee between the hours of 4:00 o'clock P.M. and 9:00 o'clock A.M., commencing on this date, Wednesday, August 30, 1967, at 4:00 o'clock P.M. and terminating thirty (30) days thereafter.

2. Any person violating any provisions of this order and proclamation shall be subject to arrest and prosecution, and upon conviction thereof, shall be subject to the penalties provided by law.

And I do hereby direct that a copy of this order and proclamation be filed as a public record in the office of the City Clerk of the City of Milwaukee.

Dated at Milwaukee, Wisconsin, this 30th day of August, 1967, at 2:52 o'clock P.M.

HENRY W. MAIER,  
Mayor

**Certification**

**CITY OF MILWAUKEE**

**OFFICE OF THE CITY CLERK**

**ROOM 205, CITY HALL, MILWAUKEE, WISCONSIN 53202**

**Phone: 276-3711 Ext. 2221**

**Ray Markey**

*City Clerk*

**Chester P. Schmidt**

*Deputy City Clerk*

**February 7, 1968**

I hereby certify that the attached is a copy of the Proclamation issued by His Honor Henry W. Maier, Mayor of the City of Milwaukee on August 30, 1967.

**RAY MARKEY**

*City Clerk*

**Defendant's Requested Instructions**

- I. Resisting or obstructing an officer is defined by section 946.41 Wis. Stats. 1967. It is a separate offense from the mayor's proclamation violation for which the defendant was initially placed under arrest. No inferences as to defendant's guilt or innocence on the resisting charge should be drawn from the mere fact defendant was placed under arrest for violating the mayor's proclamation. Both offenses are separate and distinct from the other and each has its own set of elements which must be proved in order to constitute a violation thereof. You are instructed in this case to disregard defendant's arrest for the mayor's proclamation and decide the guilt or innocence of the defendant solely on the facts pertinent to the resisting arrest charge.

**Verdict**

We, the Jury, find the defendant, JAMES EDMUND GROPP, guilty in manner and form as charged in the complaint.

Dated this 9 day of Feb., A.D., 1968.

C. J. MUCK

Foreman or Forelady

**Order of the Court, Providing Probation, Etc.**

At a regular term of the County Court, Misdemeanor Division, held at the City of Milwaukee, in the County of Milwaukee, State of Wisconsin, the defendant James Edmund Groppi was convicted of the offense of Resisting an Officer and

It appears to the satisfaction of the Court that the defendant shall not suffer the penalty provided by law;

It is Ordered and Adjudged:

1st. That the sentence in this case is hereby suspended and execution stayed for the full term of 6 months House of Correction—stayed 2 yrs. probation, subject to the provisions of the Laws of this state, the rules and orders of the Court, and such conditions of probation as were ordered in this case by the Court, including—

2nd. That the defendant is hereby placed on probation for a term of 6 months House of Correction—stayed 2 years probation & costs.

It is Further Ordered. That this order be forthwith filed and recorded in the office of the clerk of this Court.

And in addition thereto—sentenced to pay a fine of 500 dollars and costs or 6 months House of Correction in default of payment. Fine and costs to be paid in 24 hours.

Dated at Milwaukee, Wisconsin, this 12 day of February, 1968.

By the Court,

F. RYAN DUFFY, JR.

Acting Circuit Court Judge.

Branch 12

### **Motion After Verdict**

Comes now the defendant in the above-entitled action by his attorney, Thomas M. Jacobson, and, upon all of the files, records and proceedings heretofore had herein, respectfully moves this Court for the entry of an order setting aside the jury verdict of guilty and entering a verdict of not guilty, or in the alternative granting to the defendant a new trial, and

AS GROUNDS THEREFOR respectfully shows to the court:

1. That the trial court erred in denying the defendant's Motion for Change of Venue on the ground of community prejudice; said motion was denied on the ground that the statute applied only to felony cases.
2. That §956.03 (3) Wis Stat. is unconstitutional in that it denies to a defendant who is charged with a misdemeanor offense a fair trial as required by the Fourteenth Amendment of the United States Constitution.
3. That the trial court erred in refusing to accept the defendant's affidavit of prejudice filed against the court sitting as an acting Circuit Court judge.
4. That the trial court erred in quashing the defendant's subpoena upon Henry W. Maier, Mayor of the City of Milwaukee, whose testimony was material to the defense.
5. The trial court erred in precluding the defendant from introducing evidence upon the trial that the Mayor's proclamation, as applied to the defendant, was unconsti-

*Motion After Verdict*

tutional; said defendant's arrest was made for a violation of such proclamation.

6. That the trial court erred in admitting, over defendant's objection, prejudicial evidence of other crimes:

- a. Evidence was introduced upon the trial of the defendant's alleged use of profanity directed toward the arresting officers.
- b. Evidence was introduced upon the trial concerning the defendant's arrest for his alleged violation of the Mayor's proclamation.
- c. Evidence was introduced upon the trial relating to the conduct of the defendant in going "limp" after his arrest, said conduct was not the basis of his being charged with resisting arrest.

7. That the evidence adduced upon the trial was not sufficient to support the jury verdict.

8. That the trial court erred in admitting in evidence, over the defendant's objection, incompetent and immaterial testimony.

9. That the jury verdict of guilty was based on incompetent evidence and the finding of guilty was based on evidence that did not pertain to the charge for which the defendant was on trial. (See exhibit A attached hereto.)

*Motion After Verdict*

10. That a new trial should be granted in the interest of justice.

Dated at Milwaukee, Wisconsin this 12th day of February, 1968.

Respectfully submitted,

FR. JAMES E. CROPP, Defendant

By:


THOMAS M. JACOBSON

Thomas M. Jacobson

*Counsel for Defendant*

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**Exhibit Annexed to Motion**

(See Opposite) 

## Groppi

# Priest Guilty in Arrest Case

From page 1

Groppi's attorney, asked that the jury be polled. Each juror confirmed the decision.

Before the jury returned its verdict, Duffy told about 30 courtroom spectators: "Whatever the decision, I want to hear from the court on the part of everyone."

Many of the spectators were members of the Milwaukee NAACP youth council, sponsors of the open housing demonstrations. Father Groppi is the council's adviser.

### Police in Court

Police officers were stationed in the courtroom and in the corridor outside.

Youth council members surrounded Father Groppi after the verdict and walked with him from the courtroom on

the sixth floor of the safety building. He was released without bail.

Father Groppi was arrested Aug. 31 when he led a march in defiance of Mayor Maier's proclamation prohibiting demonstrations in the city. The ban was lifted two days later.

Father Groppi said that at the time of his arrest he was going to city hall to question Maier about the constitutionality of the ban on marches.

### Arrests Are Listed

When police seized him, Father Groppi said, he went limp.

Father Groppi has an arrest record dating to 1965. Court files included the following:

June 4, 1965, standing on a highway and interfering with traffic, found guilty and fined \$10; Dec. 7, 1965, disorderly

conduct, found guilty and fined \$100 and costs; May 6, 1967, resisting an officer and obstructing an officer, found guilty of obstructing and not guilty of resisting, fined \$100 and costs; July 31, 1967, disorderly conduct, charge amended to violation of Maier's emergency resolution, found guilty, appeal pending; Aug. 31, 1967, violation of mayor's proclamation banning demonstrations and disorderly conduct, court action pending; Sept. 1, 1967, violation of mayor's proclamation, court action pending.

## Jury Decides Groppi Resisted Policemen

A circuit court jury found that jury or any other jury. I Father James E. Groppi guilty was respected on that jury Friday of resisting arrest during and made my decision in acting an open housing march accord with my intellect, not my emotions."

Palmer said he felt "sympathy for the man" but that Father Groppi had convicted himself. He said Father Groppi had admitted on the witness stand that he had gone limp when police tried to arrest him.

"Sitting down is a passive resistance," Palmer said.

After the verdict was given, Thomas Jacobson, Father

Turn to Groppi, page 8, col. 6

case, set Monday for hearing motions and possible sentencing.

The jury of nine men and three women deliberated 2 hours and 35 minutes before returning the verdict at 4:55 p.m. Father Groppi frowned when it was read.

### Priest "Isn't Surprised"

Asked by a reporter to comment, Father Groppi said:

is the council's advice.

#### Police in Court

Police officers were stationed in the courtroom and in the corridor outside.

Youth council members surrounded Father Groppi after the verdict and walked with him from the courtroom on

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Father Groppi has an arrest record dating to 1965. Court files included the following:

June 4, 1965, standing on a highway and interfering with traffic, found guilty and fined \$10; Dec. 7, 1965, disorderly

## Jury Decides Groppi Resisted Policemen

A circuit court jury found Father James E. Groppi guilty Friday of resisting arrest during an open housing march here last summer.

Police testified during a one and a half day trial that the Catholic priest kicked and cursed them when they took him into custody. He denied resisting or cursing.

Father Groppi faces a possible maximum penalty of a year in county jail, a \$500 fine or both. County Judge F. Ryan Duffy, Jr., who sat as a circuit judge in hearing the case, set Monday for hearing motions and possible sentencing.

The jury of nine men and three women deliberated 2 hours and 35 minutes before returning the verdict at 4:45 p.m. Father Groppi frowned when it was read.

#### Priest "Isn't Surprised"

Asked by a reporter to comment, Father Groppi said: "Mississippi. It's no surprise to me. This happens every time we come in here. You got 11 white jurors and 1 'yassuh black.'"

Father Groppi obviously referred to the one Negro juror, William Palmer, 722 W. Brown st. Palmer heard Father Groppi's comment on a television news report Friday night and called The Milwaukee Journal. He told a reporter that he did not like Father Groppi's statement.

"I wasn't a 'yes' man on

that jury or any other jury. I was respected on that jury and made my decision in accord with my intellect, not my emotions."

Palmer said he felt "sympathy for the man" but that Father Groppi had convicted himself. He said Father Groppi had admitted on the witness stand that he had gone limp when police tried to arrest him.

"Sitting down is a passive resistance," Palmer said.

After the verdict was given, Thomas Jacobson, Father

Turn to Groppi, page 8, col. 6.

**Notice of Appeal**  
**STATE OF WISCONSIN**  
**CIRCUIT COURT—MILWAUKEE COUNTY**

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STATE OF WISCONSIN,

*Plaintiff,*

v.

FR. JAMES E. GROPPi,

*Defendant.*

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To:

FRANCIS X. McCORMACK, Esq.

Clerk of Court

Milwaukee County

Milwaukee, Wisconsin

HUGH R. O'CONNELL, Esq.

District Attorney

Milwaukee County

Milwaukee, Wisconsin

PLEASE TAKE NOTICE that the defendant in the above-entitled action, by his attorney, Thomas M. Jacobson, hereby appeals to the Supreme Court of the State of Wisconsin from the judgment of conviction and the sentence imposed upon him in the above-entitled action by the Honorable F. Ryan Duffy, Jr., on the twelfth day of February, 1968.

Dated at Milwaukee, Wisconsin this 12th day of February, 1968.

FR. JAMES E. GROPPi,  
Defendant

By:

THOMAS M. JACOBSON

Thomas M. Jacobson

*Counsel for Defendant*

# **Transcript of Testimony**

**[1]**

**CHARGE: RESISTING AN OFFICER**

**TRIAL** in the above entitled action, held on February 7th, 8th and 9th, 1968 in Circuit Court, before the **HONORABLE F. RYAN DUFFY, JR.,** Acting Circuit Judge, presiding.

**APPEARANCES:**

**John Lauerman**—Assistant District Attorney, appearing for the State of Wisconsin.

**Thomas M. Jacobson**—Attorney for Defendant.  
Defendant in Court.

**James J. Thurber**—Acting Official Reporter.

**[2] PROCEEDINGS**

February 7th, 1968.

**JOHN F. KITZKE**—appearing specially for the Honorable **Henry Maier**—Mayor of the City of Milwaukee.

**Mr. Kitzke:** I have the original order to show cause, which I would like to file, showing service.

**The Court:** Hello gentlemen, before us we have the State of Wisconsin, Plaintiff, versus **James Edmund Groppi**, Defendant, case number—Circuit Case Number G-4718, which is an order to show cause, and an affidavit attached thereto, returnable by 4 o'clock this afternoon. On an order to show cause, why the subpoena, issued heretofore on behalf of **Henry Maier**, Mayor of the City of Milwaukee, for this Court, above entitled, on February 8th, 1968 at 3 o'clock, could not be quashed.

**Mr. Kitzke:** That was the time on the subpoena, Your Honor, yes sir.

*Transcript of Testimony*

The Court: So you're the moving party?

Mr. Kitzke: I am John F. Kitzke, representing the City of Milwaukee.

The Court: Do you have a statement to make, at this time?

Mr. Kitzke: I am representing the Mayor, Your Honor. We are at a complete loss, what if anything, could require the presence of the Mayor before the Court. Since [3] there is nothing he can add, or assist the Court in, in the trial of this case tomorrow. The charge as we understand it, from looking at the record, is a violation of Section 946.41 of the Wisconsin Statutes, entitled, Resisting or Obstructing an Officer, we believe, on the information and belief, that the incident involved, which took place on the 31st day of August, 1967, at approximately 8:40 p.m., at or about North 9th and West North Avenue, in the City and County of Milwaukee, State of Wisconsin, the affidavit of the Mayor clearly indicates that he was no where near the incident, or scene of this incident, he did not see it, and he knows of no facts of his knowledge, which in any way would add to, or subtract from the case to come before the Court tomorrow morning. The only thing we can presume here, is that someone is going to attempt to harass the Mayor, and inquire into his executive authority in issuing a curfew order on August the 30th, 1967. Now the law is clear, that whatever law is violated, gives no party, no party the right to resist, and the trial before this Court tomorrow, will not be on any constitutionality, or validity of the curfew, or proclamation, but will be solely whether the defendant did, or did not resist. Now it is clear in the law, so clear that it is difficult to find citations, because it is so universally accepted that a person arrested cannot question the previous law. [4] In the question of resisting, we cite, 21 Am Jur 2d 95,

*Transcript of Testimony*

in which it stated, that a legislative act is presumed proper and constitutional until such time as a Court determines otherwise, this cannot be determined in the resisting case. In *Warren v. United States*, 177 F2d 596, the Court clearly ruled that one may not disobey the law, even if in good faith they may believe it to be unconstitutional. In *State v. Carroll*, 38 Conn. 449, there is a clear definition of the problem we have before the Court. The *Am. Rep.*, 409, at page 428, said, every law of the legislature however repugnant to the constitution, has not only the appearance and semblance of authority, but the force of law, it cannot be questioned at the bar of private—of private judgment, and if thought unconstitutional cannot be resisted, but it must be received and obeyed as to all intents and purposes until the law is questioned and set aside by the Courts. This principle is essential to the very existence of order and society, and let us just visualize Your Honor, the complete ridiculousness, if anyone could violate the law, because in their own mind, because they felt it wasn't constitutional, say a man goes through a stop sign, and says, I am sorry, you cannot arrest me, and I am going to resist, if because I don't think that law is constitutional, now obviously this is not the law, obviously if you want to question the constitutionality of a law, you do it by [5] proper judicial process, and not by resisting, and this Court will not have to determine, nor can they be asked to determine the constitutionality of the curfew order, or the proclamation, this is being questioned and tried in other courts. I point out to the Court this is so well recognized as pointed out by the Connecticut case, it almost needs no citation, I have previously pointed out by the affidavit of the Mayor, he was not at 9th and North Avenue, he saw nothing, or heard nothing, which would add to the testimony before this Court and

*Transcript of Testimony*

what happened. Now when we turn to the power of subpoena, certainly this power is within the Court, within the power of the Court, and the Court is able to quash that subpoena, where the Judge has not issued it, on a basis shown, that it was necessary, but rather under our process, an attorney has, an attorney has issued the subpoena. We must never forget the separation of power between the executive branch and the Court. It is not the Court's prerogative to inquire into the thinking or judgment, the background in an action of an executive, and we believe that the only objective in this subpoena Your Honor, is to attempt to harass the Mayor, and to take him from his very important duties to the citizens of this community, and I defy the defendants to show one fact, that the Mayor observed, or could be questioned on anything other than a witch hunt, to try to attack his thinking and [6] judgment in issuing the curfew, and this I don't believe even the Court has a right to inquire into. In 85 Pa. State, 433, this special question was considered as to a governor, and not wanting to quote a very long case Your Honor, I would just like to take one very important statement of that Court, the Court should have been formed before it undertook to interfere with the personal liberty of the citizen, by his summary process of his attachment, or subpoena, the matter was sustained, now it is apparent that the subpoena was issued for no tangible cause to the party, and no properly legal purpose, hence, no one was bound to obey it. Now the Mayor, of course, is not going to disobey the subpoena of this Court, but he certainly has the right to come to this Court and ask the Court to quash this subpoena, and he should not be forced to sit here for no purpose at all. Further in that case at page 672, the Court said, we better at the outstart recognize the status of the executive branch, which is a coordinate

*Transcript of Testimony*

branch of the government, with the power to exercise what should, or should not be done within its own department, and with it in the exercise of these constitutional powers, the Court said, they have no more right to interfere than the executive branch, under like conditions, to interfere with the Courts, and this Court, of course, will not interfere with the executive's branch, with the Mayor, unless good [7] cause is shown, that the subpoena should exist, and that the Mayor be called upon.

The Court: So you're moving that the subpoena be quashed?

Mr. Kitzke: Yes, sir, I am.

The Court: On this basis, on the order to show cause and affidavit?

Mr. Kitzke: Yes, sir.

Mr. Jacobson: Your Honor, Counsel would object to Plaintiff's Counsel, or in this matter, the Mayor's Counsel, determining or describing the action, on the part of Defendant's Counsel in subpoenaing witnesses in criminal trials, for no other purpose than harassment, I believe it improper argument. At this juncture, it is whether or not the issuance of a subpoena and a calling of a material witness, as far as the defendant is concerned, and is concerned presently, without the Court having benefit of the presence of the person so subpoenaed, and the benefit of the elicitation of certain facts on that witness, on part of the Counsel who subpoenaed that witness, any type of attempt to categorize the subpoenaing of a witness in a criminal trial, and term it to be as harassment, I think is improper argument, and I think it is very dangerous Your Honor in that, in a criminal trial, we are talking about a defendant's constitutional rights, and the opportunity [8] to have due process, and full opportunity to develop defense on his

*Transcript of Testimony*

behalf, and to allow the inferences of subpoenaing, to be for no other purposes than of harassment, I think it is very dangerous in a free society. I don't think we want that kind of situation to develop in this community, where we are going to protect certain people becoming material, material witnesses in cases, on speculation that they are being called for witnesses for no other purposes than for harassment. On the specific argument that is proper, and that is the actual law that is applicable in this particular case, and the reason for the subpoenaing of the Mayor as a witness in this matter, as the Court knows we have a motion that is pending which will be argued tomorrow, prior to impaneling the jury, which goes to the validity of the Mayor's proclamation, both on its face and as applied, that proclamation upon my information and belief is the basis for the arrest of the defendant, and then it was in the course of effectuating that arrest, and carrying out that arrest the alleged resisting took place. Now Counsel for the Mayor is—has not cited any Wisconsin authority, on the position that in fact, a person cannot resist an invalid arrest, and the citations that Counsel had prepared and presented to the Court, if the Court deems that that is an issue, and that it would be upon the correctness of the proclamation in fact being an issue in this case, whether [9] or not the Mayor was a material witness, if the Court decides that it wants argument on whether that is an issue or not, I would ask we have time to brief that question, because it becomes fundamental to the case that will be heard by the jury tomorrow. As far as Counsel understands of the law at the present time, that in fact, an invalid arrest would nullify any resisting, if it was proved if there was resisting, and I would ask the Courts leave to brief that question, prior to the Court ruling whether or

*Transcript of Testimony*

not the Mayor ought to be a witness in this case or not. It's Counsel's understanding of the law that in fact, if the proclamation is invalid, then the arrest is no good, and then if it should be proved it was resisting, which of course is denied by the defendant, if there should be resisting, even so resisting an invalid arrest is not a crime, and we have some authority, at this time we would like more time to research.

The Court: You already have a motion on the constitutionality on file with this Court, which I will rule on, 9 o'clock, prior to the trial, is that correct?

Mr. Jacobson: That is correct, Your Honor. Now, as to, if the understanding of Counsel's correctness to the law, on the matter of whether or not resisting an invalid arrest then is not a crime, the Mayor's testimony becomes crucial, and he does become a material witness in [10] this proceeding, and in that only the Mayor can testify as to the conditions which led the Mayor to invoke his emergency powers in the form of the proclamation, which the defendant is alleged to have violated, which forms the basis of the arrest, and subsequent resisting, only the Mayor would have the facts available and testify those into the record, those facts only the Mayor would know, what condition existed in the City of Milwaukee, which he believed constituted an emergency, which enabled him to invoke the emergency powers of the Mayor, in the form of the proclamation, and of course, it is for that reason that Defense Counsel subpoenaed the Mayor. Again Counsel cannot object too strenuously to the Counsel of the Mayor, in describing that kind of strategy, that subpoenaing the Mayor was for no other purpose, except for the purposes of harassment. I believe that degenerates the role of Counsel, and the proper type of argument that should be put forward in the case that has the ramifications of a

*Transcript of Testimony*

case of this nature. As a result of this Mayor's proclamation, hundreds of our citizens in this community was charged with various offenses. It seems to me it is fair game if the Mayor issues a proclamation that he ought to stand behind that proclamation, and be subject to subpoena to testify the basis for that proclamation.

The Court: All right, any further in rebuttal?

[11] Mr. Kitzke: Counsel in support cites no citations, not only none from Wisconsin, but none at all. What the Mayor's thinking was, in making the proclamation is no wise material in any way, to a resisting arrest charge. Number one, once a law is on the books, it is presumed valid and constitutional, and being so presumed, even if subsequently said, in judicial procedure it was not constitutional, the citizen must obey it at that time, because it is on the books. Now, Counsel secondly stated, that he is going to try before this Court the non-constitutionality of the proclamation, which is not a part of the resisting charge, while at the same time, he has an action pending in the Federal Court, and he claims that by virtue of the action in the Federal Court, no charges should be brought in the State Court, on the question of the proclamation, with the Federal Court rules. So he is saying that the City should not move on the proclamation, on one side, because there is a Federal Court Action, but he has a perfect right to act, to move on the other side, in a totally unrelated case.

Mr. Jacobson: I informed Mr. John Lauerman, who is now sitting in this Court, I called before the issuance of the subpoena in question, I informed Mr. Lauerman it was Counsel's intent, if the District Attorney's office was going to continue in prosecution of this case, prior [12] to the determination in Federal Court, of the validity of the Mayor's proclamation, which was invoked, that we would have no

*Transcript of Testimony*

alternative but to subpoena the Mayor, and to try the validity of the proclamation in this Court, but I informed Mr. Lauermaun, he ought to tell Hugh O'Connell, the District Attorney for Milwaukee County, and to give us an opportunity to come in Court for the very reasons that Mr. Kitzke has set forth, we, having asked that all prosecutions, based on the proclamation be delayed until the Federal Court has in fact ruled on the validity, the constitutionality, the answer that came back from Mr. Lauermaun—

Mr. Kitzke: Let's talk about the facts, the District Attorney does not represent the Mayor of the City of Milwaukee, we represent the Mayor of the City of Milwaukee, he doesn't have to be subpoenaed because you think that maybe sometime if the Court rules that you can go behind the resisting, to the initial law, you might some day, five days from now, you can delve into his thinking, as to his exclusive function, in issuing that order, and not properly reviewable, and as to his thinking, the law is basic, the resisting arrest has nothing to do with the law under which the man was arrested, you must obey an existing law, if you don't think it constitutional, you go to Court and change it, you don't punch the officer [13] in the nose.

The Court: I will reserve a decision to quash the subpoena, until after my ruling at 9 o'clock tomorrow.

Mr. Kitzke: The Federal Court asked Counsel on both sides, Mr. Jacobson and the City, to take no action in any other Court, relative to the constitutionality of this proclamation, until the Federal Court ruled. We wouldn't want to be in a position where we are breaching our position with the Federal Court, and we insist that it is not a question of ruling of constitutionality, but a question whether that can ever be questioned.

*Transcript of Testimony*

Mr. Jacobson: That is the position of the Defense Counsel, it is precisely as the City Attorney's position, we understand the Federal Court asked that no action be taken on the proclamation until they have had an opportunity to rule on it. We have informed the District Attorney's office of that fact, we would like this put off until after the determination in Federal Court, and that is still pending.

The Court: There are some motions on file. I will rule on them, as well as this order to show cause, and affidavit to quash.

Mr. Kitzke: 9 o'clock, Your Honor?

The Court: 9 o'clock sharp.

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**[14] PROCEEDINGS**

February 8th, 1968.

**APPEARANCES:**

(Same as above noted).

(IN CAMERA)

The Court: All the parties here, that need to be here?

Mr. Lauerman: Yes, Your Honor.

The Court: In the matter of the State of Wisconsin, Plaintiff v. James Edmund Groppi, Defendant, Circuit Case Number G-4718, wherein this Court has been appointed to hear the matter, as a Circuit Court Judge, there were three motions scheduled for ruling this morning. Firstly—I might add, these motions, and decisions of motions, and rulings of motions, are heard in chambers, because the jury panel is so extensive out in the courtroom, it is impractical for them to leave into the corridors, and this should be heard outside of their presence. Firstly,

*Transcript of Testimony*

there is a motion filed by the Defendant's Defense Counsel, Mr. Jacobson, to dismiss on behalf of the Defendant, James Edmund Groppi, on the grounds that the Mayor's proclamation is unconstitutional. That is the first motion to be ruled on this morning.

Mr. Jacobson: If it please the Court, at this time I am withdrawing the motion, the question of the validity and constitutionality of the proclamation is now [15] pending in Federal Court, and that is the proper form wherein that determination should be made. I would like to say this, Your Honor, at this time, there is a matter of a subpoena on the Mayor of the City of Milwaukee, the determination by this Court as to whether or not that subpoena is going to be honored, or whether it should be quashed. The purpose of the bringing of the subpoena on the Mayor was to have the Mayor be called as a witness on behalf of the defendant, and to elicit from the Mayor testimony regarding the issuance of the proclamation, which formed the basis for the defendant's arrest in this matter, on August 31, 1967, and then on the basis of those facts, the defense would have brought a motion that the proclamation, the emergency powers as applied to this defendant was unconstitutional. Now, yesterday, when Counsel argued the matter of the priority of the defense of this matter, resisting an unlawful arrest, did not cite any cases. Just to make the record complete, a case, Nathaniel Wright v. State of Georgia, a decision in 1963, citations, 373 US 284, 10 Lawyer's Edition, 2d Page 349, 83 Supreme Court, 1240, quote, and I have the Lawyer's Edition case Your Honor, that would be on 10 Lawyer's Edition 355, where I am now quoting the language of the United States Supreme Court—

The Court: Well, let's—

*Transcript of Testimony*

**[16]** Mr. Jacobson: The gist of the decision, I won't read the language, it is just to the fact, the fact, resisting an unlawful arrest is not a crime, and I have another case, *City of Columbus v. Julia Holmes*, a decision from the Court of Appeals from the State of Ohio, 169 Ohio, 25, 152 n.e. Section 301. I did have an opportunity to take a look at the cases that were cited by the City Attorney, their cases were from the late 1800's. The case that is most recent is *Wright v. Georgia Case*, Supreme Court, in a case similar to this one, some Civil Rights demonstrations, found that resisting an unlawful arrest, was not a crime. So Your Honor, in summary, at this time we are not going to proceed with the argument on the constitutionality of the proclamation, in that it is in Federal Court, and should be settled there. However, we would ask the Court to rule on the subpoena on the Mayor, for the reasons we indicated, the facts, we have reason to believe this would put in issue the constitutionality of the proclamation, which was applied, and further, then if that was ruled unconstitutional by the Court, the issue of whether or not resisting an unlawful arrest, then would be a matter, would be decided on, based on the authority that we have presented to this Court. We believe the cases hold, that one cannot be found guilty on an unlawful arrest.

Mr. Kitzke: I think Counsel is referring to **[17]** cases in which, the arrest by the officer, may have been declared unlawful because the officer did not observe, or have sufficient facts on which to make an arrest. This is distinctly different than a claim of an unlawful arrest based on the unconstitutionality of the proclamation, or law. As a matter of law, it is presumed constitutional until such time a Court of proper jurisdiction rules it unconstitutional, and a officer has a right and must rely on the face of the law in

*Transcript of Testimony*

any statute book, ordinance book, or any proclamation, because it is his duty, and it is incumbent upon him to enforce an arrest under every law of the ordinance of the City, or proclamation of the Mayor, where it is understood neither the officer, or the person being arrested has the right to make their own judgments at that point as to the constitutionality of that law. Therefore, why he Mayor put the proclamation into effect, or what facts he had in his mind, or observations, or information, has nothing to do with the resisting case. The only thing that you have the right to show, is the facts that occurred on the street, why the officer made the arrest, and whether there was a resisting, what happened in the Mayor's mind prior to the issuance of the proclamation, is not relevant. Now they are not even questioning its constitutionality, that motion is not going to be even heard.

The Court: Here is my rulings as follows. Firstly, [18] the motion to dismiss on the part of the Defense Counsel Mr. Jacobson, on behalf of the Defendant James Edmund Groppi, on the grounds that the Mayor's proclamation is unconstitutional has been withdrawn. The Court therefore will need to have no ruling on that. Secondly, there being no constitutional questions of law in that regard, the subpoena issued on behalf of the defendant, ordering the appearance of the Honorable Henry Maier, Mayor of the City of Milwaukee before this Court on February 8th, 1968 at 3 o'clock, is hereby quashed. Thirdly, the motion to dismiss on the grounds of Section 956.03 (3) that it is unconstitutional, is before the Court for ruling this morning, as a Circuit Court Judge, and that is denied. Plead the case on its merits.

Mr. Jacobson: On that last motion Your Honor, to make this sure for the record, they had a—

*Transcript of Testimony*

The Court: The prior—

Mr. Jacobson: The basis for this particular motion, the Court denied a change of venue, because of community prejudice, and the rationale of the Court was that the statute only provided a change of venue to community felonies, and not in misdemeanors.

The Court: That's right.

Mr. Jacobson: Therefore at this time the Defense Counsel on behalf of the Defendant, has challenged the [19] constitutionality of the change of venue, to community prejudice statute, on the basis that it is a denial of equal protection to criminals, or alleged criminals, on a basis of a serious line of demarcation, of one year, that is what separates a misdemeanor from a felony. However we have an infraction of fundamental rights at issue, and that, that statute has really no foundation, so we are attacking it on that basis, of equal protection.

The Court: My motion to dismiss is on the grounds that it is a matter for the legislature, and not the Courts, so the motion to dismiss on the change of venue, on the grounds that section is unconstitutional, because it provides for a change of venue, is denied. Now, that we have all these motions disposed of, we will proceed on this case, on its merits, and we will proceed to select a jury.

(In Open Court.)

The Court: Do both sides want the complaint read in its entirety, or just the body?

Mr. Jacobson: Your Honor, I think the entire complaint, please.

The Court: Ladies and Gentlemen of the Jury, this is a criminal complaint, State of Wisconsin, Milwaukee County, in the County Court Misdemeanor Branch. State of Wis-

*Transcript of Testimony*

consin, Plaintiff, against James Edmund Groppi, the [20] Defendant. Complaint for resisting an officer, in the State of Wisconsin, through the Sheriff, Constable, or any police officer of the City of Milwaukee. On the State Case Number 2-63208, "whereas Wilfred Buchanan, being first duly sworn on oath, states to the Honorable John J. Kinney, as Magistrate, that James Edmund Groppi, the above named defendant, on the 31st day of August, 1967, in the County of Milwaukee, Wisconsin, did unlawfully, knowingly, resist Wilfred Buchanan, a duly appointed and qualified, and acting police officer of the City of Milwaukee, in said County, while the said Wilfred Buchanan was then and there engaged in doing an act in his official capacity, and with lawful authority, to-wit: said Wilfred Buchanan personally observed said Defendant resist Buchanan, at 900 West North Avenue, in the City of Milwaukee, in said County, to-wit: while said defendant was being carried to a police wagon, after being placed under arrest, said defendant began kicking his legs, striking said officer, Wilfred Buchanan in the body with his foot, that said defendant then states to Wilfred Buchanan, "you fuckin' son-of-a-bitch, I want your number". "Contrary to Section 946.41 of the Statutes, and against peace and dignity of the State of Wisconsin, and prays that the said James Edmund Groppi, may be arrested and dealt with, according to law, signed Wilfred Buchanan, subscribed and sworn to before me this [21] 1st day of September, A.D., 1967, Magistrate John J. Kinney, I hereby find and determine, that there is probable cause for the issuance of a warrant in the above matter, Magistrate John J. Kinney.

(Jury impaneled.)

The Court: All the other jurors that do not have to sit on this particular case, are to report to the fifth floor,

*Transcript of Testimony*

Circuit Clerk's Office, on the fifth floor. The members of the jury panel and the lady who is serving as the alternate, will report back here at 2 o'clock, we will start promptly at 2 o'clock.

(Court recessed until 2 p.m. February 8th, 1967.)

(Court reconvened at 2 p.m. February 8th, 1967.)

(Jury Present.)

The Court: The jury has been impaneled. Now we will ask if the Assistant District Attorney wishes to make an opening statement.

Mr. Lauerman: Yes, Your Honor. A part of making my opening statement is to inform the Court and members of the jury, that Mr. Joseph Lex, Assistant District Attorney, with the District Attorney's Office, will be seated at Counsel table during the course of this trial. May it please the Court, Ladies and Gentlemen of the Jury, you heard the complaint read to you this morning, when you [22] were still members of the panel, as such, I would just like to have a very few minutes to tell you, what the State intends, through its witnesses to show to you, during the course of this trial. On August 30th, 1967, the proclamation was issued by the Mayor of Milwaukee, which regulated the times during which demonstrations could be made in the City of Milwaukee. On August 31st, 1967, Father Groppi and several other members of the Youth Council, and other people began a march in the evening hours. The march was taking place at a time that the Mayor had determined marches should not be taking place. Inspector Ullius, of the Milwaukee Police Department, by use of a bull-horn, which is a magnifying device, to magnify the voice, read a copy, read from a copy of the Mayor's Proclamation, telling the marchers, that their marching was

*Transcript of Testimony*

in violation of this proclamation, he did this on two separate occasions within a span of several minutes. On the third occasion, around 10th and North Avenue, in the City of Milwaukee, he again warned them, that what they were doing, was in violation of the law. The marching continued, so at this point Inspector Ullius told Sgt. Frank Miller of the Milwaukee Police Department, to make arrests. Father Groppi was arrested by Police Officer Armando Brazzoni, who was a member of Sgt. Miller's squad. At the time he was arrested, there [23] was a scuffle, after which Father Groppi went limp onto the street, so Sgt. Miller and two other police officers, Armando Brazzoni and Wilfred Buchanan picked up Father Groppi, in order to carry him to the patrol wagon, the paddy wagon, which was about 100 feet from the point where he had gone limp, Officer Armando Brazzoni picked Father Groppi up around the back area, his hands underneath his shoulders, Sgt. Miller picked him up by one leg, and Officer Buchanan picked him up by the other leg, they then proceeded to carry him to the paddy wagon. As I said before this was a distance of approximately 100 feet, when they got to the paddy wagon, suddenly Father Groppi, as the officers were releasing him, in order to have him put in the paddy wagon, Father Groppi kicked Officer Wilfred Buchanan in the chest, some words followed, after which the defendant, Father Groppi was successfully placed in the wagon. The State will prove to you, or show to you that the acts of Father Groppi in this case, constituted a resistance, as directed toward Officer Wilfred Buchanan, thank you.

The Court: Mr. Jacobson, representing the defendant, do you wish to make an opening statement.

Mr. Jacobson: The defense will reserve their opening statement until later, Your Honor.

The Court: All right.

*Transcript of Testimony*

**[24]** Mr. Lauerman: Your Honor, the State would wish to have State's Exhibit marked for identification, and entered into evidence as State's Exhibit 1, containing a certified copy of the proclamation.

(State Exhibit Number 1, marked for identification.)

The Court: Certified copy.

Mr. Lauerman: Of the proclamation, dated August 30th, 1967.

Mr. Jacobson: Objection, Your Honor.

Mr. Lauerman: What grounds?

Mr. Jacobson: Well, there has been no foundation laid at this time, for the introduction of the proclamation, and secondly, the proclamation is immaterial to the charge with which the defendant is before the Court and jury, and that's all.

Mr. Lauerman: The State would wish to be heard out of the presence of the jury, Your Honor.

The Court: Right, members of the jury, will be excused for a few minutes.

(Jury excused.)

Mr. Lauerman: You want to argue your objection?

Mr. Jacobson: Yes.

The Court: State's Exhibit marked for identification, is a certified copy of the Mayor's proclamation of August 30th, 1967, there will be an objection thereto, on the part of **[25]** Mr. Jacobson, what do you wish to state to your objection?

Mr. Jacobson: At this point we don't believe the State has established any foundation for the introduction of the proclamation into evidence, nor established its materiality. As to the second point, the defense this morning withdrew any constitutional objections to the proclamation in the

*Transcript of Testimony*

proceedings, in the resisting arrest charge, for the reason, that the state of the proceeding, even at this time, as far as the record is concerned for the charge of resisting arrest, the proclamation on its face, attacking that proclamation's constitutionality, does not become material, to whether or not Father Groppi in fact resisted arrest. However, defense counsel, anticipating that the proclamation would be offered into evidence by the State, had under subpoena the Mayor of the City of Milwaukee, for the purpose of eliciting certain testimony from the Mayor, as to what emergency conditions the Mayor felt existed in the City of Milwaukee, at the time of the issuance of the proclamation. In order to lay a proper foundation in the record, for a charge as a matter of law, to the validity of the proclamation and the use of the Mayor's emergency powers as applied to the facts of the defendant in the incident before the Court and jury. Now, the Court has quashed the subpoena, indicating it was not material, that any [26] testimony that would be elicited from the Mayor to these proceedings, that is, to the resisting arrest proceeding. The fact is that defense counsel has been precluded from putting facts into the record, through the Mayor, to show that in fact, emergency conditions did not exist in the City of Milwaukee, on the 30th day of August, 1967, to warrant the issuance of the proclamation, which is now being offered into evidence. As a matter of fact, was a direct infraction of citizens' own constitutional rights to freely demonstrate under the protection of the United States constitution. Having been precluded from doing that, we would object at this time to the proclamation being offered into evidence, on the basis that it does not become material, the proclamation, what it says, to the offense of resisting arrest.

Mr. Lauerma: Regarding Counsel's first objection, that—being that there was no foundation laid, I would

*Transcript of Testimony*

refer the Court to Section 889.18 of the statutes, entitled Official Records as Evidence, sub. 1, "every official record, report, or certificate made by any public officer pursuant to law, is evidence of the facts, which are therein stated, and which are required or permitted to be, by such officer, recorded, reported, or certified, except that the record by the County Clerk of License or certificate, under 147.23 or 153.05, shall not be evidence on behalf of the [27] licensee, or certificate holder—without production of the license or certificate or competent evidence from the board or body that issued the same". Sub. 2, Copies as Evidence. "A certified copy of any written or printed matter preserved pursuant to law in any public office, or with any public officer in this State, or of the United States is admissible in evidence, whenever and wherever, the original is admissible, and with like effect." Regarding the present State's Exhibit 1, for identification, this is a certified copy of a public record, and as such is admissible under this section.

The Court: May I see that.

Mr. Jacobson: May I respond to this, what I mean by not proper foundation, I am well aware of the certified record of the Wisconsin Statutes, and it is true, that in fact, this is properly admitted into evidence, but there has been no foundation through any witnesses to indicate the proclamation is an issue in this case, there hasn't been any testimony offered in the record, that in fact the proclamation was issued, or that any officers were acting on what was issued, or anything of that nature. The State is leading off with an exhibit which we have nothing in the record to indicate why they are material to these proceedings, and because the State has not laid the proper foundation to offer this exhibit into evidence.

*Transcript of Testimony*

**[28]** Mr. Lauerman: Let me proceed briefly, to Counsel's second point, as to materiality. Under the charge that the defendant, in the present case is charged with, it behooves the State to prove that the officer was acting both in his official capacity and with lawful authority. For that reason the proclamation becomes very material, because that is the reason for the arrest, and the subsequent resisting, would be as to that arrest. So it does behoove the State to show the reason for the officers arresting Father Groppi, so that the jury will not be confused as to why the arrest was permitted in this case. I think it is as material as, for instance a battery charge, for which a man was arrested, which the Court and jury could take judicial notice of, or any other reason, disorderly conduct, for any other reason that a person may be subsequently arrested. That the officer was acting under a lawful authority, and I think for that reason, this is very material and if the Court would care to rule on that aspect, on that specific issue, then the State would have no objection to not introducing State's Exhibit 1 for identification until the proper point and time, when the first witness would get to that point, whereby, the proclamation would become material in that respect.

The Court: I will reserve a ruling.

Mr. Lauerman: Until that time?

**[29]** The Court: I will reserve a ruling until such time it is called upon.

Mr. Lauerman: Very good.

(Jury present.)

*Inspector Roy Ullius—for Plaintiff—Direct*TESTIMONY FOR PLAINTIFF

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INSPECTOR ROY ULLIUS, called as a witness on behalf of the State of Wisconsin, being first duly sworn, on oath testified as follows:

*Direct Examination by Mr. Lauerman:*

Q. Would you please state your name, sir? A. Roy Ullius.

Q. What is your occupation? A. I am a police officer.

Q. How long have you been a police officer? A. 25 years.

Q. Are you a police officer for the City of Milwaukee Police Department? A. Yes, sir.

Q. And what rank do you hold? A. Deputy Inspector.

Q. How long have you been a Deputy Inspector? A. A little over two years.

[30] Q. Inspector Ullius were you an Inspector for the Milwaukee Police Department on August 31st, 1967? A. I was.

Q. What were your hours of work on that date? A. My tour of duty started at 2 p.m., and ended at 2 a.m. the following morning.

Q. Do you remember where you were at approximately 7 p.m. on that date? A. I do.

Q. Where were you? A. I was at St. Boniface Church, in the City of Milwaukee, at North 11th and West Meinecke Streets.

Q. What happened when you were at that place, on that date? A. At approximately 7 p.m., on Thursday, August 31st, 1967, a group of three to four hundred persons commenced a march, three to four abreast, south on North 11th Street, toward West North Avenue.

*Inspector Roy Ullius—for Plaintiff—Direct*

Q. What did you do as this march began? A. I drove the squad I was operating to the middle of the 2500 block of North 11th Street, at approximately 2539, I stopped my squad and took a portable loud speaker, a public address system from the squad, and placed it on top of the squad, using the roof of the car for a resting place for this portable speaker.

Q. What did you do then? [31] A. I then read a proclamation, a copy of a proclamation that I had received when I came to work at 2 p.m. on this date.

Q. Did you read it through this portable loud speaker you had? A. Yes, sir, I did.

Q. I show you what has been marked State's Exhibit 1 for identification, and ask you, if you know what that is?

A. It is an exact copy, of the copy of the proclamation that I had in my possession on that date.

Q. What did you do after you first read the proclamation to this crowd of people? A. The group of people continued their march, singing and booing, to a degree that I do not know how many people marching heard me read this proclamation, and then I proceeded to the 2300 block of North 11th Street, and again read the proclamation.

Q. Did you read this proclamation in the same manner that you previously had? A. Yes, sir.

Q. What happened then? A. The march continued to West North Avenue, turned east on North Avenue, and at North 10th and West North Avenue, I advised the marchers in the same manner, that the continuation of this march was a violation of the proclamation, and that if they did not stop this march, at this time, arrests would be made.

[32] Q. What did you observe happening then? A. The march continued eastbound on the north side of the street on West North Avenue.

*Sgt. Frank Miller—for Plaintiff—Direct*

Q. What did you do then? A. I then advised the police officers that were with me, they should take police action, to stop the march.

Q. Do you remember any particular officers? A. Sgt. Frank Miller was immediately beside me, and Officer Brazzoni was with him, several other police officials were present there, at the time.

Q. Are these addresses that you have been testifying to, regarding that of North 11th and West North Avenue, and of the 2500 block of North 11th Street, and the 2300 block of North 11th Street, and that of 10th and North Avenue, are all those addresses in the City and County of Milwaukee, State of Wisconsin? A. They are, sir.

Mr. Lauerman: That's all.

Mr. Jacobson: Your Honor, the defense moves to strike the line of testimony that has been put in the record, as being immaterial to the resisting arrest charge.

The Court: That is the foundation, so I will overrule your objection.

Mr. Jacobson: No questions.

The Court: You're excused.

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【33】 SGT. FRANK MILLER, called as a witness on behalf of the State of Wisconsin, being first duly sworn, on oath testified as follows:

*Direct Examination by Mr. Lauerman:*

Q. Would you state your name please? A. Frank Miller.

Q. What is your occupation, sir? A. Police Officer.

Q. Is that for the City of Milwaukee Police Department?  
A. Yes, sir.

*Sgt. Frank Miller—for Plaintiff—Direct*

Q. What is your rank? A. Police Sergeant.

Q. How long have you been a member of the Milwaukee Police Department? A. 16 years.

Q. How long have you been a Sergeant? A. Eight years.

Q. So then you were a Sergeant on the Milwaukee Police Department on August 31st, 1967, is that correct? A. Yes, sir.

Q. Do you remember what your hours of duty were on that date? A. This particular duty, was 4 p.m. to 4 a.m.

Q. Do you remember where you were on August 31st, 1967, at approximately 7 p.m.? A. Yes, I do.

**[34]** Q. Where was that? A. I was in the vicinity of 11th and West North Avenue.

Q. Why were you there? A. I was there as a Field Supervisor, with officers under my command, to parallel a march that was started approximately at this time, at which, was marching on West North Avenue.

Q. Did you subsequently see these marchers? A. Yes sir, I did.

Q. Do you remember what time? A. It was approximately 7 p.m.

Q. What did you do when you saw these marchers? A. I instructed the officers under my command to parallel the march, as they marched on North Avenue, on 11th Street, east on West North Avenue, from 11th Street.

Mr. Jacobson: Will you read his answer back?

(Answer read back.)

*By Mr. Lauerman:*

Q. While you were watching the marchers, can you state, whether or not you had occasion to see Inspector Ullius?

A. Yes, I did.

*Sgt. Frank Miller—for Plaintiff—Direct*

Q. What if anything, did you observe him do? A. Inspector Ullius was walking on the road, east with the march, on West North Avenue, and he was at the very beginning of the march, I myself was practically at his [35] side, also at the head of the march.

Q. What happened as you were walking? A. Inspector Ullius had read off the Mayor's proclamation to the marchers informing them of the violation of the proclamation, and when we reached 10th Street, Inspector Ullius again read off the proclamation to the marchers.

Mr. Jacobson: I am going to object to the answer, and the question, as being immaterial to the resisting arrest, I'd like to be heard on the objection at this point Your Honor.

Mr. Lauerman: Perhaps we could go in there.

Mr. Jacobson: I'd gladly have the argument in front here, whatever the Court wishes.

The Court: What is your objection, then I will rule on it.

Mr. Jacobson: The objection Your Honor, is that any testimony as to what occurred in response to what Inspector Ullius did in regard to the marchers is immaterial to what the defendant is charged with, the only thing that is material is what the Sergeant did, in respect to the defendant, and on what basis, and what authority.

The Court: On the other hand, the Inspector, I believe, testified this man was a subordinate of his, and acting under his authority, for that reason I think it is material, and I will overrule your objection.

*Sgt. Frank Miller—for Plaintiff—Direct*

**[36]** *By Mr. Lauerman:*

Q. Sgt. Miller, after you had heard Inspector Ullius read the proclamation to these marchers, for the second time, what happened, what did you observe? A. At this time the marchers, were marching, they had their arms locked, marching approximately three to four abreast, they were marching very slowly.

Mr. Jacobson: I am going to object to the question and answer, on the basis of immateriality, as well as it is highly prejudicial that any testimony of this nature, being put in the record, as far as this defendant is concerned, and what he is charged with.

The Court: It might possibly apply, it is a preliminary question, so I will overrule the objection, let the answer stand.

*By Mr. Lauerman:*

Q. You then followed these marchers to the ten hundred block of West North Avenue, what happened then, if anything? A. After Inspector Ullius read off the proclamation for the last time, he instructed me to stop the march, and make arrests.

Q. What did you do? A. I turned my attention to the officers under my command, and I instructed them to stop the march, and make arrests.

Q. What did you observe then? **[37]** A. Patrolman Armando Brazzoni, was instructed to arrest Father Groppi.

Mr. Jacobson: Just a minute, that is not responsive.

The Court: Overruled, he said what he observed, I will let that answer stand.

*Sgt. Frank Miller—for Plaintiff—Direct*

The Witness: I accompanied him, Brazzoni to Father Groppi's side, and Father Groppi was placed under arrest, Officer Richard Dembrowski also joined us there, and we proceeded to walk him to a wagon, which was parked in mid-block between 9th and 10th on West North Avenue, the wagon—

Mr. Jacobson: That is enough officer, make your answers more responsive, in a question and answer form, no narratives.

*By Mr. Lauerman:*

Q. I will just back up a little bit Sergeant, you said that you and Officer Brazzoni, went to Father Groppi, and placed him under arrest? A. Yes, sir.

Q. Who placed Father Groppi under arrest? A. Patrolman Brazzoni.

Q. Were you with Patrolman Brazzoni when he did so? A. Yes, sir.

Q. Was Father Groppi right there too? [38] A. Yes, sir.

Q. What did Officer Brazzoni placed Father Groppi under arrest for? A. Violation of the Mayor's Proclamation.

Mr. Lauerman: State renews its motion to have State's Exhibit 1 for identification entered into evidence, as State's Exhibit 1.

Mr. Jacobson: Objection, same grounds, not material.

The Court: State's Exhibit 1 marked for identification will be received into evidence as State's Exhibit Number 1, pursuant to my ruling that I would reserve it, until such time it was material.

*Sgt. Frank Miller—for Plaintiff—Direct*

*By Mr. Lauerman:*

Q. Sgt. Miller, you testified—

Mr. Jacobson: At this point, I would like to place one additional objection in the record. I think I'd better do it outside the presence of the jury, Your Honor.

The Court: All right, jury will be excused.

(Jury excused.)

Mr. Jacobson: At this point Your Honor, the defense again would renew its objection to the quashing of the subpoena, of the Mayor of the City of Milwaukee, now that the proclamation in fact is in evidence, and has been accepted in evidence. The need for the presence of [39] the Mayor to substantiate that in fact emergency conditions existed in the City of Milwaukee, in fact utilized this, in issuing his proclamation, becomes all the more material to a proper defense of this case, and that the Court quashed the subpoena of the Mayor, and not permitted Counsel to elicit testimony from the Mayor, regarding the invoking of the emergency powers, under Statutes and ordinances of the City of Milwaukee, in the form of the proclamation. At this point the defense would like the record to clearly indicate, again, there is an objection.

The Court: All right, as I said, State's Exhibit Number 1, marked for identification, being a certified copy of the Mayor's proclamation, under the law, can be received into evidence as an official document. Secondly, the motion to dismiss, that was filed on behalf of the defendant, which I ruled on today, on the grounds that the Mayor's proclamation was un-

*Sgt. Frank Miller—for Plaintiff—Direct*

constitutional, has been withdrawn, so therefore, we have nothing to rule on, the constitutionality, or unconstitutionality of the Mayor's proclamation on August 30th. So therefore on that basis of those two, on the basis of those two reasons, I received that, State's Exhibit 1, State's Exhibit Number 1 into evidence, and that's another reason why the subpoena the requesting of the subpoena was quashed, there is no [40] necessity for it, because the Mayor's proclamation is an official document, and as so, the reasons for the Mayor's proclamation, and the reason behind it, would be immaterial to the issue in this particular case, but your objection is noted for the record, and all your prior objections thereto also.

(Jury present.)

*By Mr. Lauerman:*

Q. Sgt. Miller, after Father Groppi was placed under arrest, what happened? A. We started walking Father Groppi to the wagon, which was parked mid-block between 9th and 10th Streets on West North Avenue—

Mr. Jacobson: That's enough of who helped him, at this point, so I don't have to interrupt the witness when he is testifying, I think we established we were going to object to any narrative, on the part of this witness, we would like the response in a form of question and answer.

The Court: Question and answer, give a direct answer, what you saw, and don't draw any conclusions, what you saw, what you heard, what the defendant did, if anything.

*Sgt. Frank Miller—for Plaintiff—Direct*

*By Mr. Lauerman:*

[41] Q. Who helped you direct Father Groppi toward the wagon? A. Patrolman Brazzoni, and Patrolman Dembowski.

Q. Did something happen on your way to the wagon? A. Yes.

Q. What was that? A. Several members of the Youth Council, came up to us, and started tugging at Father Groppi, trying to pull him away from us.

Q. What did you do? A. Officer Dembowski was separated from us, and was making an arrest of one of the Youth Council members.

Mr. Jacobson: Objection, it is not responsive.

The Court: The question is what did you do.

*By Mr. Lauerman:*

Q. What did you do? A. I am sorry. I directed him, Patrolman Dembowski to try to have the Youth Council members stop from interfering.

Q. And then what happened? A. Officer Dembowski did just that, and at this time, Father Groppi was still in our custody, Patrolman Brazzoni and myself.

Q. Now what if anything, did Father Groppi do at this time? A. At this very time, he went limp.

Q. Could you explain, what you mean by that? A. Yes, he became limp in body, and sat in the street.

[42] Q. So then what did you do? A. I called for another officer, this was Officer Wilfred Buchanan, to assist Patrolman Brazzoni and myself in picking up Father Groppi, and—

Mr. Jacobson: I am going to object Your Honor, to this answer of Sgt. Miller, as being not responsive to the question.

*Sgt. Frank Miller—for Plaintiff—Direct*

The Court: I think that was responsive to an extent, where I will overrule the objection. Reframe a new question.

*By Mr. Lauerman:*

Q. So Officer—Officer Buchanan came to help you and Officer Brazzoni? A. Yes, sir.

Q. And what did the three of you do? A. Patrolman Brazzoni picked up Father Groppi by the upper part of his body, by the shoulders, I picked up his right leg, Officer Buchanan picked up his left leg, we then started—

Mr. Jacobson: That's enough. Objection Your Honor, not responsive.

The Court: The question was what the three of you did, I will overrule the objection.

*By Mr. Lauerman:*

Q. So the three of you picked up Father Groppi, then what did [43] the three of you do? A. We started carrying him towards the wagon.

Q. How far was the wagon from this point? A. Approximately 100, to 125 feet.

Q. And did the three of you carry him all the way to the wagon? A. Yes, we did.

Q. As you neared the wagon, what if anything happened? A. As we came toward the rear of the wagon, the doors were opened, there were—the wagon was almost full from other—

Mr. Jacobson: This is not responsive, Your Honor.

The Court: Just what happened?

The Witness: We attempted to place him in the wagon.

*Sgt. Frank Miller—for Plaintiff—Direct*

The Court: All right, then what happened?

The Witness: As we were easing him in the wagon, Father Groppi suddenly became violent—

Mr. Jacobson: Just a minute, I am going to object—

The Court: Just what did he do, physically?

Mr. Jacobson: I am asking that word, violent, be stricken from the record, that the witness be admonished, I don't want those kind of descriptions placed in evidence, in front of this jury, this Sergeant knows how to testify.

The Court: If the jury wants to attach any [44] significance to this, if you do, you do, if you don't you don't.

Mr. Jacobson: That word violent, is obviously a prejudicial word, it is immaterial, the officer cannot testify in that manner, and he knows better than to testify in that manner, he can testify to the facts, to what occurred, but the conclusions is for the jury to decide, I don't want this Sergeant using language of this nature, he has testified before.

The Court: Same ruling, if you want to attach any significance fine, if you don't, you don't, just weigh all these things, anything you think is material, but if you don't think it is material, then disregard it. Officer tell us physically what he did, and what did you do.

*By Mr. Lauerman:*

Q. What did you observe Father Groppi do? A. He kicked out with his left leg at Officer Buchanan, catching him in the chest, and he hollered out, "let go of my leg you fuckinn' son-of-a-bitch—

*Sgt. Frank Miller—for Plaintiff—Direct*

Mr. Jacobson: I am going to object to the language that Father Groppi was supposed to have used, as being immaterial to the offense of resisting an officer, and the language of course, would be outside the province of that charge.

[45] The Court: I will overrule the objection, just exactly what was heard, what was said, that is all for the jury to weigh one way or the other, so I will overrule the objection.

*By Mr. Lauerman:*

Q. After he stated this, what happened? A. At this time, Officer Buchanan was on the ground, Patrolman Brazzoni and myself were able to put Father Groppi in the wagon, and just before the wagon doors were closed, he called me a fuckin' son-of-a-bitch—

Mr. Jacobson: Your Honor, I think that is outside of the scope of this charge, and certainly it isn't material, that is set forth in what the Court read to the jury earlier, we object to that testimony, and ask that it be stricken.

The Court: I will overrule the objection, the answer will be sustained as responsive.

*By Mr. Lauerman:*

Q. After Father Groppi was placed in the wagon, what did you do? A. I ordered the doors closed, and ordered the wagon to convey the people to the station.

Q. Did the wagen then leave? A. Yes.

Q. Did you stay on the scene? A. I stayed on the scene, on North Avenue.

Mr. Lauerman: That's all.

*Sgt. Frank Miller—for Plaintiff—Cross*

**[46]** *By Mr. Lauerman:*

Q. These address that you have been referring to, and the address where Father Groppi was placed in the patrol wagon, are those in the City and County of Milwaukee, State of Wisconsin? A. Yes, sir.

Mr. Lauerman: That's all.

*Cross Examination by Mr. Jacobson:*

Q. Sgt. Miller, were there quite a few people around Father Groppi at the time you were trying to place him in the patrol wagon? A. There were people in the wagon, a lot of people in the wagon.

Q. What about outside of the wagon? A. There were officers on the street.

Q. Were there newsmen on the street? A. I believe there were.

Q. Photographers? A. I can't answer that truthfully.

Q. Were there other persons that had taken part in the march in the area? A. There might have been.

Q. Well, were there, or weren't there? A. If you were referring to newsmen, there were newsmen.

**[47]** Q. I asked if there were other marchers in the area, at the time you made the arrest of Father Groppi? A. Oh, yes.

Q. And when Father Groppi said, at the time that he was supposed to have kicked Officer Buchanan in the chest with his left leg, you fuckin' son-of-a-bitch, I want your number, does that—were those words uttered with some degree of force? A. Yes, they were.

Q. Pretty loud, right? A. Loud enough for me to hear it.

Q. Well, you were right there weren't you? A. Yes.

*Sgt. Frank Miller—for Plaintiff—Cross*

Q. So what I am talking about is loudness, did he shout that out? A. I can't say whether it was shouted out.

Q. The situation that you described, would it be fair to say that Father Groppi was quite excited at the time he was being placed in the wagon?

Mr. Lauerman: I would object, that it would call an opinion and conclusion on the part of the witness.

The Court: Can you answer that?

The Witness: He was very, very, calm.

The Court: Just answer the question, was he [48] excited?

The Witness: At this time, minute, yes.

*By Mr. Jacobson:*

Q. So he didn't whisper that? A. No, he didn't.

Q. Was he talking in a normal conversational voice, do you recall that? A. No, it was above normal.

Q. So there was some amplification at this particular place, he uttered that with some amplification, is that right?

A. Others could hear that besides myself, yes.

Q. Could have heard it? A. Sure.

Q. And you don't really know if there were others in the vicinity, besides yourself that saw this arrest take place, do you? A. No.

Q. Now, you say that Officer Buchanan, had Father Groppi's left leg, is that right? A. Yes, he did.

Q. And you say, you had his right leg? A. Right, right leg.

Q. And Officer Brazzoni was holding the upper part of his body, under his arms? A. Yes.

[49] Q. You say as you attempted to place Father Groppi in the wagon, he struck out with his left leg, and caught Officer Buchanan in the chest? A. That's right.

*Sgt. Frank Miller—for Plaintiff—Cross*

Q. Do you know whether or not Officer Buchanan was gouging Father Groppi's ankle, with his left thumb? A. I do not know that.

Q. You don't know what might have caused Father Groppi to strike out with his left leg, do you? A. No, I don't.

Q. All you know, is that it went out? A. That's right.

Q. Now, you were the arresting officer for the resisting charge, is that correct? A. No.

Q. Brazzoni is the arresting officer? A. Brazzoni made the initial arrest of the violation of the Mayor's proclamation.

Q. I am talking about the resisting? A. It was Wilfred Buchanan, and Officer Brazzoni.

Q. You are not a complainant in this case, are you? A. No.

Q. Were your officers all equipped that evening in question, with riot sticks? A. Yes, they were.

[50] Q. Did you have rifles that night. A. We might have had them with us, I don't—do not recall on the scene there, we might have had them with us, I don't recall.

Q. Did you have your gas masks that night? A. Are you referring with us at the march, no.

Q. Did you have riot helmets? A. Yes.

Q. Did you have tear gas with you? A. No.

Q. When you broke up the march, did you administer your night stick on any of the marchers?

Mr. Lauerman: I object, what you're asking is immaterial.

The Court: I will overrule, you may answer that.

The Witness: You were asking whether I had a night stick, no.

*Richard Dembowski—for Plaintiff—Direct*

*By Mr. Jacobson:*

Q. Some other—some of the other officers did? A. Yes.

Q. They were using them, weren't they?

Mr. Lauerman: I object, that is immaterial.

The Court: Overruled, you may answer that.

The Witness: I don't know whether they were using them or not.

*By Mr. Jacobson:*

[51] Q. You didn't see them? A. No, I was not watching them.

Q. What were you doing? A. What was I doing?

Q. You were on the scene, weren't you? A. Yes.

Q. Were you just watching Father Groppi, or— A. No, I was supervising the scene.

Q. The whole scene? A. Yes.

Mr. Jacobson: That's all.

The Court: You are excused.

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RICHARD DEMBOWSKI, called as a witness on behalf of the State of Wisconsin, being first duly sworn, on oath testified as follows:

*Direct Examination by Mr. Lauerman:*

Q. Would you state your name please? A. Richard Dembowski.

Q. What is your occupation sir? A. Police Officer.

Q. For the City of Milwaukee Police Department? A. Yes.

Q. How long have you been so employed? A. Nine years.

*Sgt. Frank Miller—for Plaintiff—Cross*

**[52]** Q. Were you so employed on August 31st, 1967? A. I was.

Q. What were your hours of duty on that date, sir? A. From 4 p.m. to 4 a.m. in the morning.

Q. Do you remember where you were at approximately 7 p.m. on that date? A. At 7 p.m. I was abreast of the marchers, going south on 12th Street, in a marked police squad car.

Q. Did you see the defendant, Father James Groppi on that evening? A. I did.

Q. Did you happen to see him while in the company of Patrolman Brazzoni, and Sgt. Miller? A. I did.

Q. And what happened when you saw him in the company of Sgt. Miller and Officer Brazzoni? A. I assisted Sgt. Frank Miller and Patrolman Brazzoni in making the arrest of Father Groppi.

Q. And after Father Groppi was placed under arrest—

Mr. Jacobson: Just a minute, that could be a little misleading, what he was being arrested for at that particular time.

*By Mr. Lauerman:*

Q. Do you remember what he was being arrested for at that particular time? **[53]** A. Yes, sir.

Q. What was that? A. That was for the violation of the Mayor's proclamation.

Q. What did you do after Father Groppi was arrested? A. I took Father Groppi by his left arm, and began escorting him from the parade route.

Q. Where were you escorting him to? A. I was going to escort him to the paddy wagon, or patrol wagon.

Q. On your way to the patrol wagon, what if anything,

*Sgt. Frank Miller—for Plaintiff—Cross*

happened? A. A group of Commandoes tried to take Father Groppi away from us.

Q. So what did you do? A. I was instructed by Sgt. Frank Miller, that he would take care of Father Groppi, and I was to try to keep the other people away from the Priest.

Q. So what did you do?

Mr. Jacobson: That all becomes immaterial after that, I would object to any more testimony of what Officer Dembowski did, unless he was with Father Groppi.

The Court: I will overrule the objection.

*By Mr. Lauerman:*

Q. So what did you do? A. After Sgt. Frank Miller, and Patrolman Brazzoni took Father Groppi, I tried to push the marchers, or keep them away [54] from Father Groppi.

Q. And did you further accompany Father Groppi to the patrol wagon? A. I did not.

Q. You stayed behind? A. Yes, I was there at the initial place of arrest.

Q. Did you stay in the area where the Commandoes had come over? A. Yes.

Q. All right, did you, at any time, go to the rear of the paddy wagon? A. I did not.

Q. You don't know anything, about what happened, as far as Officer Buchanan and Father Groppi, at the rear of the wagon, do you? A. No.

Mr. Jacobson: I object to what the Officer has testified to, from the time he left Father Groppi, and ask that it be stricken as being immaterial as to the charge in question.

*Armando Brazzoni—for Plaintiff—Direct*

The Court: Overruled, it might be the res gestae, if the jury wants to attach any significance do so, if the members of the jury find they don't want to attach any significance to it, don't. Is that all of this witness?

【55】 Mr. Jacobson: I have no questions.

The Court: You're excused.

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ARMANDO BRAZZONI, called as a witness on behalf of the State of Wisconsin, being first duly sworn, on oath testified as follows:

*Direct Examination by Mr. Lauerman:*

Q. Would you please state your name? A. My name is Armando Brazzoni.

Q. What is your occupation, sir? A. Patrolman, with the Milwaukee Police Department.

Q. How long have you been so employed? A. Five years.

Q. So you were employed as a police officer for the Milwaukee Police Department on August 31st, 1967, is that correct? A. That is correct.

Q. Do you remember what your hours of duty were, on August 31st, 1967? A. Yes, it was 4 p.m. to 4 a.m.

Q. Do you remember where you were at approximately 7 p.m. on that date? A. Approximately 7 p.m., oh, in the vicinity of the 1100 block of West North Avenue.

Q. What were you doing at that place, on that date? A. At that time, we were parallel on the street, going east, 【56】 next to the march that was being conducted.

Q. Did you have occasion to see Father Groppi, while you were in the presence of Sgt. Frank Miller, on that day?

*Armando Brazzoni—for Plaintiff—Direct*

A. Yes, I was along side of Father Groppi, about three feet to his right.

Q. What did you do? A. At this time I walked along side of him, and when we reached the 900 block of West North Avenue, we were instructed, or I was instructed by Sgt. Miller, to make any arrests, if necessary, for the violation of the Mayor's proclamation.

Q. Where was Father Groppi, at this time? A. Father Groppi was to my left.

Q. How far? A. About three feet.

Q. So what did you do? A. When the order came through to make the arrests, I reached over and grabbed Father Groppi with my left hand, and grabbed him around the right shoulder and collar.

Q. What did you say to him, if anything? A. I said to Father Groppi, you're under arrest for the violation of the Mayor's proclamation.

Q. Then what did you do? A. I then started to take him to the middle of the intersection, but at this time, there was several Youth Council members [57] that had Father Groppi around his arm, attempting to pull him away from me, I instructed Father Groppi to tell the Youth Council members to leave him go, and that he will not be hurt.

Q. What happened then? A. One of them, one of the Youth Council members continued to grab him, I then placed him under arrest also.

Q. Then what did you do? A. Then Sgt. Miller and Richard Dembowski came to my assistance, we then started to take Father Groppi to a patrol wagon.

Q. What if anything happened while you were going to the patrol wagon, with Father Groppi? A. In the middle of the intersection, I'd say approximately about 100 feet away from the wagon, Father Groppi went limp, he fell to

*Armando Brazzoni—for Plaintiff—Direct*

the city street, and he sat on the pavement, he refused to be taken to the wagon.

Q. So what did you do? A. I then immediately grabbed him, continuing to grab him, to lift him up, at this time I had a shot gun in my hand, and there were other Youth Council members, Commandoes who were attempting to pull him away from us.

Q. Were you able to get ahold of Father Groppi? A. Yes, after I had given my shot gun to another officer.

Q. How did you grab him? A. In fact, I had him at several different positions, and with [58] him kicking his feet in a motion, like pedaling a bicycle, pumping his feet back and forth—

Mr. Jackson: I don't like to interfere with the Officer's testimony, but these are self-serving statements, and we would ask to have their answers be more responsive to the questions being put to them.

The Court: Well, I think that was responsive.

Mr. Jacobson: The latter part of the answer isn't responsive.

The Court: I think it is responsive. Frame a new question.

*By Mr. Lauerman:*

Q. At that time, when you tried to grab him, what did you observe Father Groppi doing? A. He was kicking his feet, as if to pedal a bicycle, a motion back and forth.

Q. Who, if anyone, from the Police Department came to your aid? A. As I recall, it, at that time I now recollect—

Mr. Jacobson: I object to the form of the question Your Honor, I think that would be objectionable.

*Armando Brazzoni—for Plaintiff—Direct*

The Court: Just answer directly, who came to your aid at that time.

The Witness: At that time, I know of Sgt. Miller was at that spot, that I know of.

**[59]** *By Mr. Lauerman:*

Q. What did Sgt. Miller do? A. Sgt. Miller then grabbed him, I believe it was the right leg.

Q. Do you know what happened to Father Groppi's left leg? A. It was being held by another officer, at that time I didn't know who the officer was.

Q. And then, what did you, and Sgt. Miller, and the other officer do? A. We continued to—we picked him up, and carried him to the wagon at this time.

Q. You say you picked him up, and carried him to the wagon, could you explain whether you walked in front of Father Groppi and the other officers, or whether you were carrying up the rear, or just how was he being carried? A. Well, I was, I had one arm underneath Father Groppi and another one around his back, carrying him to that effect, and I believe I was facing toward the wagon.

Q. I see, your back was then to Father Groppi, and the other officers? A. That is correct.

Q. And you carried him in this manner to the wagon? A. That is right.

Q. Now as you approached the wagon, or as you got to the rear of the wagon, what did you do? **[60]** A. Well, I kept losing my grip, because of the moving motion, and finally—

Mr. Jacobson: I am going to object to that, actually what he did, and that will be all we need.

The Court: He was moving in a motion. Frame a new question.

*Armando Brazzoni—for Plaintiff—Direct*

*By Mr. Lauerman:*

Q. You testified that you kept, you kept losing your grip?

A. That is correct.

Q. That would be the grip you had on Father Groppi?

A. That is correct.

Q. And would this be while you were taking him to the wagon? A. That is correct.

Q. And why did you keep losing your grip? A. Because his feet was in a moving motion, kicking them back and forth as if to be pedaling a bicycle or kicking—

Q. But at any rate, you did get to the rear of the wagon with Father Groppi? A. That is correct.

Q. As you got to the rear of the wagon, what did you do? A. The door was open, and I pushed him up into the wagon, there was a jerk all of a sudden, I don't know what caused the jerk, the kicking of feet, a real fast kick—

Mr. Jacobson: Just a minute, I move that be stricken Your Honor, he has testified to what he doesn't [61] know.

The Court: He is telling us what caused it.

Mr. Jacobson: So anything else is in terms of speculation on his part.

The Court: He is being honest, the jury can weigh if there was a jerk.

*By Mr. Lauerman:*

Q. There was a jerk, could you describe what you mean by a jerk? A. Just like this, in other words, fast movement.

Mr. Lauerman: Let the record indicate, the witness just then, twisted his body with his arms di-

*Armando Brazzoni—for Plaintiff—Direct*

rectly in front of him, to indicate his body was twisting.

*By Mr. Lauerman:*

Q. Now you say—when you just made that motion for the jury, what are you describing? A. I am describing as if to make like a fast shove with the feet, or a push with the feet.

Q. Were you describing—when you made this movement in Court just then, were you describing the motion of somebody's body? A. That is correct.

Q. Whose body was that? A. Father James Groppi.

Q. All right, after Father Groppi made that motion, what did [62] you do, or what did you see?

Mr. Jacobson: I am going to object to the form of the question Your Honor, I don't know what kind of motion he is talking about.

The Court: You heard my ruling, it is for the jury to weigh. Next question.

Mr. Jacobson: It is assuming some facts, he is—

*By Mr. Lauerman:*

Q. I will rephrase the question, after Father Groppi made the motion that you demonstrated in open Court, what did you do? A. Well at that time he was slipping out of my grip, I quickly regrabbed him, and pushed him into the wagon, and at this time, he stated, I want that man's badge number, and I placed him into the wagon further, and he says, I want that man's badge number, that fuckin' son-of-a-bitch.

Q. After he stated this, what did you do? A. This—at this time, that was it, someone had grabbed me and pulled

*Armando Brazzoni—for Plaintiff—Cross*

me away for a moment, the doors were closed and I was instructed by Sgt. Miller to get on the wagon, and go right into the station with him, at this time.

Q. So you accompanied the wagon? A. I accompanied the wagon, on the rim, on the outside of the wagon to the back.

Q. Now as you were placing Father Groppi into the wagon [63] just prior to him making the movement that you demonstrated for us— A. Yes.

Q. Was your back turned, was your back—were you facing the back of the wagon? A. I was facing the back of the wagon.

Q. So you couldn't see what was happening behind you? A. No.

Q. Did you subsequently, after Father Groppi was placed in the wagon, have occasion to see Officer Buchanan? A. I did not see Officer Buchanan, until the next morning.

By Mr. Lauerman: That's all.

Mr. Jacobson: Your Honor, we are asking that the entire testimony of this officer be stricken, that clearly, quite clearly what he has testified to was set out in the complaint that was read to the jury. It is constituting resisting arrest charge, he didn't see anything at all. We are going to ask that all the testimony be stricken as immaterial and not relevant with which Father Groppi is before the jury today.

The Court: Objection overruled.

*Cross Examination by Mr. Jacobson:*

Q. Now, Officer Brazzoni, you say that—do you even know if Buchanan was one of the officers that was ac-

*Armando Brazzoni—for Plaintiff—Cross*

companying [64] Father Groppi to the patrol wagon? A. I did not know, no.

Q. At the time that you approached the patrol wagon, you say you had your arms around Father Groppi's under portion of his body? A. That's right.

Q. Would you have been facing the two police officers that were holding onto Father Groppi's legs? A. My back would be to them.

Q. In other words, Father Groppi's upper portion of his body would have been in front of you, in terms of the direction that you were facing, is that correct? A. Well, his face would be this way.

Mr. Jacobson: Just to be clear, I think what I will have you do is, just put your arms around me, as if I was Father Groppi, so we can clearly see in which direction, so the jury doesn't have any problem seeing what position you were carrying Father Groppi to the paddy wagon. Now, I want the record to show that Father Groppi would have been in a—your left arm would have been locked around Father Groppi's left arm, and your right arm would be holding him in the small of his back, clutching his clothing?

The Witness: Yes.

*By Mr. Jacobson:*

[65] Q. He would—would have been in a horizontal position, with two officers, one on each of his legs? A. Right.

Q. And the—your back would have been toward the other police officers, is that correct? A. Yes.

Q. All right, do you know whether the police officers had their backs to your—Patrolman Brazzoni, whether you

*Armando Brazzoni—for Plaintiff—Cross*

know, whether the police officers that were on Father Groppi's legs, had their backs to your back? A. If they had their backs to my back?

Q. That's right. A. No, they were facing my back.

Q. In other words, then all three of you were backing Father Groppi—were you walking in—were you walking—were you the lead man? A. That's correct, I was walking in the same position of the others.

Q. But you were going forward? A. Correct.

Q. Well then, when you got to the paddy wagon that was opened did you attempt to put Father Groppi in, head first? A. Back first.

Q. Your back is that what your talking about? A. Father Groppi's back.

Q. That's right, but you would have been— [66] A. Facing the wagon.

Q. That's right, you would have attempted to put his head— A. His head back—

Q. In first? A. His back portion to the wagon first.

Q. All right, now you say at the time that you pushed Father Groppi into the wagon, then head back portion first, you said you felt a jerk, a fast movement, is that right? A. Correct.

Q. You didn't—you didn't see what happened did you? A. No, I didn't.

Q. In other words, anything that your describing as to what occurred at that moment, is just your way of trying to describe the feeling of the jerking motion, correct? A. Jerking motion, and that his feet was kicking, as I stated before.

Q. You don't know whether his feet were kicking? A. I know his feet were kicking, I saw the movement.

*Armando Brazzoni—for Plaintiff—Cross*

Q. All right, there was an officer on each leg? A. That is correct.

Q. That would have been more or less the officers carrying him along with you, carrying him into the paddy wagon?

A. Not with that kind of a reaction.

Q. Well, had you felt any of these jerks, this one jerk you described? [67] A. There had been several jerks, from the time we picked him up, until the time he was in the wagon, he was continuously moving his feet.

Q. You of your own knowledge, don't know if any officer was struck by Father Groppi's foot or anything?

A. At that time, I did not know, no.

Q. You didn't observe anything at all? A. I did not observe anything, I was pulled away to the side, I don't know if it was by another officer or what.

Q. So you just don't know? A. Yes.

Q. The testimony that you read, that you made in the record, is that, as you, as you felt this jerk, then shortly there after, you heard Father Groppi say, I want that man's badge number? A. Correct.

Q. And then he again said that, I want that man's badge number, and then you said with some force and some dramatics, that fuckin' son-of-a-bitch, is that correct? A. Correct.

Q. I assume, that the latter part of what you testified to what Father Groppi said, he said with the same kind of force and volume and emphasis, that you stated to the jury? A. Definitely.

Q. And there were quite a few people in the vicinity of that [68] paddy wagon, were there not? A. Quite a few other officers.

Q. Some newsmen? A. I don't know if there were newsmen.

*Armando Brazzoni—for Plaintiff—Cross*

Q. There might have been? A. Might have been, correct.

Q. If Father Groppi said, said with a volume that you indicated, it would have carried for some distance, isn't that right? A. I believe so, definitely.

Q. And there is no question in your mind that he might have whispered this, or anything of that nature? A. No, he did not.

Q. With quite a volume that he let loose? A. Right.

Q. That—that's all you heard him say, by the way, isn't it? A. Yes.

Q. He didn't say anything else, did he? A. Not that I recall.

Q. You're sure about that? A. Not that I recall.

Q. You were right there weren't you? A. Yes.

Q. I mean, if he would have continued to— A. What's that?

[69] Q. If he would have continued to swear? A. Yes.

Q. You would remember that wouldn't you? A. Yes.

Q. And he didn't swear again, did he, that was the only time? A. No, he used it twice.

Q. He used it twice? A. Correct.

Q. What did he say, tell me exactly what he said? A. Once as we were putting him in the wagon, he stated, I want that man's badge number.

Q. There is no swearing involved in there? A. Yes, he stated that twice.

Q. You just said that, I want that man's badge number? A. That's right, stated it twice.

Q. There is no swearing involved? A. Yes.

Q. There is swearing involved there? A. Yes.

Q. All right, then you say, he said, that fuckin' son-of-a-bitch? A. Correct.

*Armando Brazzoni—for Plaintiff—Cross*

Q. That is the third time? A. No, the second time he swore, he swore twice, that is all he swore.

Q. Is it your testimony, that what Father Groppi said was, [70] I want that badge, that man's badge number, that fuckin' son-of-a-bitch, and then he said that precise thing again? A. That is correct.

Q. Because you originally testified that first time, he said, I want that man's badge number, then repeated, I want that man's badge number, and then swore? A. No, he repeated, I want that man's badge number, and then he stated, I want that man's badge number, that fuckin' son-of-a-bitch, and we placed him in the wagon, then he said fully, I want that man's badge number, that fuckin' son-of-a-bitch.

Q. So he said it on several other occasions? A. Twice.

Q. And he said it with some volume? A. Yes, he did.

Q. All right, do you know who he was referring to? A. No, I don't, he—

Q. Now just answer my question, you don't know who he was referring to? A. No, I don't.

Q. So now, when you were actually at the wagon itself, when you were placing Father Groppi in the wagon, you actually didn't see anything did you? A. When I placed Father Groppi—

Q. You really didn't see anything, did you, in terms of what [71] he was doing? A. No.

Q. You just felt the jerk? A. That is correct.

Q. That is the extent of what you actually saw at that time and place? A. That is correct.

Mr. Jacobson: That's all.

*Armando Brazzoni—for Plaintiff—Redirect*

*Redirect Examination by Mr. Lauerma n:*

Q. In the back of the patrol wagon, was there much commotion? A. Oh, definitely there was, on the way into the wagon.

Mr. Jacobson: We are going to object to anything other than the answer to the question.

*By Mr. Lauerma n:*

Q. As Father Groppi was being placed in? A. Oh sure, there was heckling of the police, the brutality, honkies, white honkies—

Mr. Jacobson: This is objectionable as being not in response to the question that was asked, certainly it isn't material to the charge that Father Groppi is before this jury on.

The Court: Well, at that time and place, there was a certain amount of commotion, let the jury weigh it one way or the other, if you feel it has significance all right, if you don't, you don't have to attach any.

[72] *By Mr. Lauerma n:*

Q. A lot of commotion?

The Court: Yes, or no.

The Witness: Yes.

*By Mr. Lauerma n:*

Q. Would you say there was a lot of noise? A. Well yes, there would have been noise.

*Armando Brazzoni—for Plaintiff—Recross  
Wilfred Buchanan—for Plaintiff—Direct*

Mr. Lauerman: That's all.

*Recross Examination by Mr. Jacobson:*

Q. Officer, do you know on what charge Father Groppi is before this jury? A. Do I know the charge?

Q. Yes, if there was a lot of noise at that time and place, when you were placing Father Groppi under arrest, was it—

Mr. Lauerman: I will object.

Mr. Jacobson: We will withdraw that question. We have no more questions.

The Court: You're excused.

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OFFICER WILFRED BUCHANAN, called as a witness on behalf of the State of Wisconsin, being first duly sworn, on oath testified as follows:

*Direct Examination by Mr. Lauerman:*

Q. Would you please state your name? [73] A. Wilfred Buchanan.

Q. What is your occupation sir? A. Police Officer, City of Milwaukee.

Q. How long have you been so employed? A. Approximately 15 years.

Q. So then you were a member of the Milwaukee Police Department on August 31st, 1967? A. I was.

Q. Do you remember what your hours of work were on that date? A. I had started at 8 a.m. on that morning, and the time of going home was undecided, we didn't know.

Q. Were you on duty at approximately 7 p.m. on that date? A. I was.

Q. Where were you at that time? A. On 9th and North.

*Wilfred Buchanan—for Plaintiff—Direct*

Mr. Jacobson: Could you talk a little louder. ,  
The Witness: 9th and North.

*By Mr. Lauerman:*

Q. Did you have occasion to see Father James Groppi, while you were with Sgt. Miller on that date? A. Yes, I did.

Mr. Jacobson: That assumes some facts in evidence that hasn't been testified to, that he was with Sgt. Miller, you want to establish that he testified he was with—

Mr. Lauerman: But he hasn't so—

**[74]** Mr. Jacobson: I will withdraw my objection.

*By Mr. Lauerman:*

Q. About what time was this? A. About 7:15, I was on 9th and North, I had went up to 10th where I met Sgt. Frank Miller, and I was behind Sgt. Miller, with some other officers, walking east on North Avenue.

Q. Did you have occasion to approach Father Groppi? A. I didn't know who he was, I was approaching when Sgt. Miller and another officer made an arrest, I was called to for assistance.

Q. You were called to for assistance? A. Yes.

Q. What did you do? A. I immediately ran over there, and said to him, on my way over there, some other men had been struggling, trying to pull the man away from the officers.

Mr. Jacobson: I am going to object, unless it—the officer saw that happen, then I'd object to the answer as not being responsive.

The Court: Did you see that happen?

*Wilfred Buchanan—for Plaintiff—Direct*

The Witness: Yes.

The Court: He said yes.

*By Mr. Lauerman:*

Q. So you went over there? A. Yes.

【75】Q. What did you observe when you got there? A. One officer got the men who was trying to struggle the prisoner away from Sgt. Miller, and this other Officer, Brazzoni, he got them away, and we started to carry—then I recognized Father Groppi, after he had went limp.

Q. Did you see Father Groppi go limp? A. Yes.

Q. Is that when you first started carrying Father Groppi? A. That is.

Q. You grabbed his leg, what leg? A. His left leg.

Q. All right, and did you follow behind Officer Brazzoni? A. Yes.

Q. In carrying Father Groppi? A. Yes.

Q. I see, you were facing the back of Officer Brazzoni? A. Yes.

Q. And what, if anything, did you observe Father Groppi doing, as you carried him to the wagon? A. On the way to the wagon, he was kicking his feet, not very violent, but he was kicking them.

Q. Now what if anything happened, and what if anything did you do, as you got to the rear of the wagon? A. I was trying to hold his leg, and I had my night stick in my hand, as I was trying to hold on, I didn't have a good 【76】hold on him, he kicked out very hard, kicked his leg loose, and then he kicked me in the chest, knocking me on the ground, on one knee.

Q. Now, just so we are clear Officer Buchanan, could you please tell the jury, whether that man, who kicked you,

*Wilfred Buchanan—for Plaintiff—Direct*

is present here in Court this afternoon? A. The man who kicked me that night, is Father James Groppi.

Q. Is he present? A. He is.

Q. Could you identify him please? A. He is sitting in the middle of the two gentlemen, at the defense table.

Mr. Lauerman: Sitting in the middle at the second table, let the record show, the witness identified Father Groppi.

*By Mr. Lauerman:*

Q. After you were kicked and fell to one knee, what did you observe happen? A. He was shouting at me, you fuckin' son-of-a-bitch, to the effect, I want your badge number, which I didn't have any badge on.

Q. But you were in uniform? A. I was in uniform.

Q. Were the other officers who carried Father Groppi to the wagon, were they in uniform? [77] A. All the officers were in uniform there.

Q. And after you heard him state these words, what did you observe? A. He had repeated it again, the same words, you fuckin' son-of-a-bitch, I want your badge number.

Q. Then what happened? A. Then he was put in the wagon by then, and he was on his way.

Q. Did you subsequently receive medical treatment for your injuries? A. Yes, I later, I went to Mount Sinai Hospital, where I was treated for a bruise and a contusion on the chest.

Mr. Lauerman: That's all.

*Wilfred Buchanan—for Plaintiff—Cross*

*Cross Examination by Mr. Jacobson:*

Q. Why didn't you have your badge numbers on that night? A. We didn't wear badges.

Q. Why not? A. Under orders from the Department.

Q. Why? A. I don't question my superiors.

Q. Do you know why you—

Mr. Lauerman: Immaterial and argumentative.

*By Mr. Jacobson:*

Q. You answered you don't know, is that correct? [78] A. I don't question my superiors, my personal opinion, it is a dangerous weapon, it can be ripped off.

Q. Is that why you—

Mr. Lauerman: I will object, he answered that question.

Mr. Jacobson: I am asking why he wasn't wearing that badge that night, if he—if that is the reason, or if that is any speculation on his part.

The Court: If you know.

The Witness: I don't know.

Mr. Jacobson: All right, that is all I wanted to know.

*By Mr. Jacobson:*

Q. In other words this was on orders of your superiors, you weren't supposed to wear—

Mr. Lauerman: Objection, repetitions.

The Court: He has answered that.

*Wilfred Buchanan—for Plaintiff—Cross*

*By Mr. Jacobson:*

Q. You say you had your night stick in one hand, and Father Groppi's leg in the other hand, is that your testimony? A. No.

Q. What is your testimony, how were you carrying him to the patrol wagon? A. I had the night stick in the hand, and that hand was around Father Groppi's leg, so was the other one.

Q. You had the night stick as well as Father Groppi's leg? [79] A. That is correct.

Q. And you were holding on pretty tight were you, to his leg? A. Apparently not tight enough.

Q. Apparently—I am not asking you for speculation, whether you were holding tight, or whether you weren't? A. I had a firm grasp, but it was not that tight.

Q. Isn't it a fact that you were actually digging your thumb into his ankle as you were taking Father Groppi in the wagon? A. No, sir.

Q. And when you were carrying Father Groppi into the patrol wagon, was it, as you got to the patrol wagon, you say the doors were opened? A. That's right.

Q. And did the thrust toward placing Father Groppi into the patrol wagon, commence before he kicked loose? Do you understand my question? A. No, not clear.

Q. When you got to the patrol wagon, you were holding his left leg, correct? A. Yes.

Q. And Sgt. Miller had his right leg? A. That is correct.

Q. And Brazzoni was holding onto his upper portion of his body? [80] A. Yes.

Q. In order to place him into the wagon, you would have to thrust him in, isn't that correct? A. Yes.

Q. Had that thrust commenced before Father Groppi

*Wilfred Buchanan—for Plaintiff—Cross*

had kicked his leg loose? A. No, not that I recall, it happened so fast, I couldn't say definitely.

Q. Would you—would you deny that the reason Father Groppi kicked his leg loose, was the grip on his leg? A. Certainly I would.

Q. What makes you so certain of that? A. I never dig my nails into anybody, I don't dig, I used my fingers for—

Q. You have testified that you had a firm grip on his leg? A. Yes.

Q. How would you apply a firm grip, if you wouldn't be applying— A. An even hold, not just one finger, sir.

Q. You certainly understand that with the hold you had, you could have applied pressure with your thumb, on his leg, or on his ankle portion, isn't that correct? A. I could have hit him with a night stick too sir, but I didn't.

Q. You don't deny the grip that you had on his leg, or ankle, [81] was of a nature—you did have your hand in fact, on his ankle? A. Yes.

Q. You deny that? A. No, I don't deny that.

Q. That was the grip you had? A. Yes.

Q. Now you indicated that he kicked his leg loose? A. Yes.

Q. Then, did he then come down on his left leg? A. A. When he kicked me with his left leg?

Q. After he kicked his left leg loose? A. He was still suspended.

Q. That's right? A. Yes.

Q. He never brought his leg completely down, his left leg? A. No.

Q. In other words, while he was still in the air, the thrust of his leg caught you in the chest? A. He pulled his leg back to his body, and kicked that way, not football style.

Q. What? A. He pulled it to his body, and kicked downward, where I was.

*Wilfred Buchanan—for Plaintiff—Cross*

Q. In what position were you in, at that time? [82] A. I was facing—he was upright, facing in a supine position, I was holding his leg toward the bottom of his foot.

Q. Well, would he have been perfectly horizontal, when you approached his— A. Not perfectly horizontal, not perfectly.

Q. His head would have been a little higher? A. That I don't know, I was concerned about getting him over there.

Q. You were holding his leg about hip height weren't you, isn't that where you were resting his leg? A. Yes.

Q. And you say he kicked down at you? A. When I say down, I mean from his body downward, and I would be at the base of him, so it would be a movement like that, not downward.

Q. What portion of your chest did he hit? A. The upper part, right in here.

Q. About shoulder high? A. Yes, about right in here.

Q. You deny that this striking of his foot, what you described as a kicking of you, was a result of any pressure that you applied on his ankle as you— A. Yes, I deny that.

Q. Now you testified that Father Groppi indicated that when—strike that—who then placed Father Groppi in the patrol [83] wagon, who placed him in the patrol wagon? A. After I went down on my knee, I think the other two officers put him in themselves, I lost my grip then.

Q. At that point, you say, you heard Father Groppi say, you fuckin' son-of-a-bitch I want your badge number? A. Yes.

Q. And then he repeated that? A. Yes.

Q. And would you say that he said this, with some volume? A. Yes.

Q. If there was—were there other persons in the vicinity? A. Yes.

*Wilfred Buchanan—for Plaintiff—Cross*

Q. Newsmen and photographers? A. I don't know, I wouldn't—

Q. If there were people in that vicinity, they would have been able to—

Mr. Lauerman: I object, calls for a conclusion.

The Court: If you know.

The Witness: I know of one newsman who was behind us, when I was turned, he was laid out flat, what happened to him, I don't know.

*By Mr. Jacobson:*

Q. I think that really isn't responsive to the question, what I want to know is, whether or not other persons were in the vicinity of the wagon, would they have been able to [84] hear Father Groppi make this statement to you?

Mr. Lauerman: I would object, calls for an opinion.

The Court: If you know.

The Witness: I couldn't answer that.

*By Mr. Jacobson:*

Q. Would you say that he did use some volume? A. Yes, but there was volume coming out of the back of the wagon also.

Q. There was some volume, but you had no trouble hearing Father Groppi say that? A. Definitely, not.

Q. Very clear? A. Yes.

Q. How far away from the back of the wagon, were you? A. Oh, I would say maybe two feet.

Q. A couple feet? A. Yes.

Mr. Jacobson: That's all.

*Wilfred Buchanan—for Plaintiff—Redirect*

*Redirect Examination by Mr. Lauerman:*

Q. If you know, what part of Father Groppi's foot struck your body? A. It would have been the entire foot more or less.

Q. Just rather flat? [85] A. Yes.

Mr. Lauerman: All right, that's all.

The Court: We will take a short recess.

(Court reconvened at 4:10 p.m., February 8th, 1968.)

(Jury present.)

Mr. Lauerman: Your Honor, the State rests, subject to rebuttal.

The Court: All right, the State has presented its case to you and has rested subject to rebuttal, tomorrow morning at 8:30 sharp, we will commence and proceed with the trial, then the defense will put in its case to you, then at the conclusion of that, after listening to the testimony of the witnesses for the State and the witnesses for the defense, then I will read my instructions to the jury, and then from the testimony on both sides, and the instructions I give you, you will determine the innocence or guilt of the defendant. So be here at 8:30 sharp, the defense will put in its case, and we will conclude this trial.

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PROCEEDINGS

February 9th, 1968.

APPEARANCES: (Same as above noted).

*Motion to Dismiss*

The Court: Before we call out the jury, the [86] State has rested, are there any motions by either side?

Mr. Jacobson: If it please the Court, at this time, the defense moves to dismiss the charge against Father Groppi, on the basis that the State has not proved beyond a reasonable doubt, that on August 31st, 1967, Father Groppi in fact resisted an officer, pursuant to the elements required under Section 946.41, sub section 1. The charge against Father Groppi as far as the resisting an officer offense, indicates that Wilfred Buchanan personally observed the defendant resist, Buchanan states when said defendant was being carried to a police wagon, after being placed under arrest, defendant began kicking his legs, striking said officer with his foot, and then defendant stated to Buchanan a certain phrase. Now as far as resisting arrest, the material offense, as far as the actual resisting would be, the kicking of the legs and striking the officer in the body with his foot, any verbal statement that accompanied such physical action, in of itself, the verbal statement wouldn't constitute a resisting an arrest. Therefore, based on the witnesses that were called, the Inspector who was the first witness, testified only regarding his giving certain—reading of the Mayor's proclamation, he wasn't at all present at the time Father Groppi was placed in the patrol wagon by Buchanan, therefore the Inspector's testimony is all immaterial as to the resisting charge. Sgt. Frank Miller was able to [87] testify that Father Groppi did in fact, kick the officer in the chest with his left leg, Buchanan was on the ground, and that there was some verbal utterances. The testimony of Richard Dembowski was again not material to the resisting charge, that

*Motion to Dismiss*

Dembowski was preoccupied with holding back some Commandoes, from the actual carrying of Father Groppi to the paddy wagon, and he admitted he wasn't present after he was requested, or instructed to hold back some Commandoes, so he doesn't know what happened at the paddy wagon, so his testimony is immaterial. Brazzoni, he testified that his back was to Buchanan, and he didn't know who Buchanan was, his back was to Buchanan, and Miller, as they carried Father Groppi to the paddy wagon, that he didn't see Father Groppi kick anybody, although he felt a jerk, and he said that the body was twisted; and then he did indicate some verbal utterances, and then we have the testimony of Buchanan, that he was in fact kicked in the chest, and he indicated that it was by the whole foot of Father Groppi, it was the flat portion of the foot, and he felt the entire impact of the foot, it would have been on the chest. So as far as actual testimony in the record is concerned, we have only two officers that were able to testify that Father Groppi kicked Buchanan, that would be Buchanan, himself, and Sgt. Miller. Now, the testimony is not clear that Father Groppi intentionally [88] kicked Buchanan in the chest, and therefore it is the position of the defense, that the State has not met the burden required by the Statutes in question, to prove the offense of resisting an officer. On that basis the defense would move to dismiss at this time.

Mr. Lauerman: Just one point Your Honor, apparently Counsel, on the basis on which he would ask for dismissal, was, as he indicated, at the end of his statement, namely, there is no showing that

*Motion to Dismiss—Denied*  
*Opening Statement by Mr. Jacobson*

there was an intentional kicking, I believe that the element that he is speaking of, is that in—and its suggested in the instructions in this case, defendant resisted the officer knowingly, defendant knew or believed that he was resisting the officer, while the officer was acting in his official capacity and with lawful authority. I think that the facts as testified to by the police officers, namely that Father Groppi did kick an officer, accompanied by the words which the officer testified to that were spoken, certainly indicates that Father Groppi did knowingly resist.

The Court: The motion to dismiss on behalf of the defendant is denied. Let's proceed with the defendant's case. You reserved your opening statement Mr. Jacobson, do you wish to call out the jury and start?

Mr. Jacobson: Yes, Your Honor, all set.

(Jury present.)

[89] The Court: As I indicated to you last night, before we adjourned, the State has presented their case to you and rested, subject to rebuttal, now the defense will put in their case. Mr. Jacobson has reserved his opening statement, which he can under the law, and he will now give it to you at this time, after that the defendant will produce its witnesses.

Mr. Jacobson: Ladies and Gentlemen of the Jury, as the Court has indicated to you, we reserved our opening statement at the beginning of this case, in order to present this opening statement to you, before the defense put on the witness stand the various witnesses that we would be calling, to elicit the evidence from the defendants point of view, as to the events that occurred on the evening of August 31st,

*Opening Statement by Mr. Jacobson*

1967. Now the Court will instruct you at the close of the case, that the opening statements of both the District Attorney and myself are not evidence, you are not to put anything that we say—an opening statement is merely a summary, narrative, of what both Counsels intend to have elicited from the witnesses in the form of testimony, which in fact is evidence, and the facts, the evidence, that you are to determine the guilt or innocence of the defendant in relation to the charge with which he has been brought before you. Now, our statement of what occurred on the evening of August 31st, is as follows, and our [90] witness will testify to this fact. The night of August 31st, 1967, Father Groppi with several hundred other young people of various ages, all kinds of ages, got together at St. Boniface Catholic Church, there was a series of marches going on, at that time, for open housing in the City of Milwaukee, the Mayor of Milwaukee in fact issued a proclamation banning certain demonstrations, during certain hours, in certain areas, in the City of Milwaukee, which was put into effect the night before the march that took place, involving Father Groppi, eventual arrests for resisting arrest occurred the following night, the second night, the night of the 31st of August, 1967, about 7 o'clock Father Groppi, and these several hundred young people of all ages, they left St. Boniface Church, St. Boniface is on 11th and Clarke, they proceeded to go down 11th Street in a southerly direction toward North Avenue, Clarke is one block south of North Avenue, one block in a northerly direction to North Avenue, then they turned toward the east, and proceeded to walk down

*Opening Statement by Mr. Jacobson*

to 9th and North Avenue, that is as far as the March got, at that time there were orders to the effect, that the police were to stop the march, in fact that is when Father Groppi was placed under arrest, Father Groppi had gotten to North and 9th, at the time he was put under arrest, for violating the Mayor's proclamation. The paddy wagon was stationed [91] between 9th and 10th, when the arrest was made of Father Groppi by several police officers. They began marching him back toward the paddy wagon, between 9th and 10th, at that time some of the Commandoes, and other Youth Council members were getting close to the officers, there was some commotion, Father Groppi went limp, some officers then picked him up, one officer that picked him up, picked him up by his back portion, one officer grabbed his leg, and another officer grabbed his other leg, and the three officers proceeded to carry him toward the paddy wagon. Now the paddy wagon was facing toward 9th, in other words in an easterly direction, so when they got towards walking him back to the paddy wagon, they were walking to the westerly side, when they got to the front of this paddy wagon, the officer that was on Father Groppi's left leg, began, let's put it this way, and the testimony will so indicate that Father Groppi felt some pain on his left ankle, as a result of the pressure that the officer was exerting, in holding his left leg, whether there was gouging, or what it was, Father Groppi felt sufficient pain that he told the officer, that the other officer is hurting my left ankle, as the officers continued to carry Father Groppi toward the back of the wagon, the pressure began in the front

*Father James Edmund Groppi—Defendant—Direct*

of the wagon, as he went to the back of the wagon, the pressure Father Groppi felt was of sufficient intensity, that he said, [92] that officer is gouging my ankle, I'd like to know his name, and I'd like to have his badge number, and he was then placed in the paddy wagon, and he repeated, I'd like that officer's name, he gouged my ankle, I'd like his badge number, and then the doors of the paddy wagon closed, and while he was in the paddy wagon, he took off his shoe, and there were some people in the paddy wagon that observed Father Groppi rubbing his ankle as a result of what Father Groppi indicated, was the pressure that had been applied to his ankle, as he was being carried into the paddy wagon, and that is the defense's case.

## TESTIMONY FOR THE DEFENDANT

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FATHER JAMES EDMUND GROPPi, called as a witness in his own behalf, being first duly sworn, on oath testified as follows:

*Direct Examination by Mr. Jacobson:*

Q. Would you state your name? A. Father James Edmund Groppi.

Q. And where do you reside at the present time, Father Groppi? A. St. Boniface Church, 11th and Clarke.

Q. And you were present in the Courtroom yesterday, were you not, when certain officers of the Milwaukee Police Department, testified to certain events that occurred on the [93] evening of August 31st, 1967, involving yourself? A. I was.

*Father James Edmund Groppi—Defendant—Direct*

Q. Were you in fact at St. Boniface Church at about 7 o'clock on that evening, that is, on the 31st of August, 1967? A. Yes, I believe that was the time.

Q. And what were you doing at that time, and for what purpose were you there? A. We had an assembly, of black and white people from the community, discussing the Mayor's proclamation, the demonstrations, the arrest of Youth Council members and people of the community on the previous night.

Q. Were there in fact, marches occurring in the City of Milwaukee at that time, which you were involved? A. Yes.

Q. What were the marches all about?

Mr. Lauerman: I object, that would be immaterial.

The Court: I will overrule the objection, you may answer that.

The Witness: Marches were for a fair housing bill, to consider the right of freedom of movement within the confines of our country and also the last couple of days were also in process of what we believed the Mayor, taking our right of freedom of speech and freedom of assembly.

*By Mr. Jacobson:*

Q. Now, did you in fact on the evening of August 31st, 1967, [94] have a march, which began at St. Boniface Church? A. August 31st?

Q. Yes. A. Yes.

Q. What time did you leave the Church with this march? A. I don't recall the exact time, I imagine it was between 7:30 and 8 o'clock, somewhere in there.

Q. And would you indicate what occurred when you left the Church? A. Well, we left the Church and began to

*Father James Edmund Groppi—Defendant—Direct*

march south on 11th Street, and to march south to North Avenue, when we got to North Avenue, we turned east.

Q. How many persons—strike that—you marched from Clarke to North Avenue? A. Yes.

Q. And in what position in this march were you? A. I was in front of the line, with certain Youth Council members in front of me, not too many.

Q. When you got to North Avenue, you proceeded east? A. That is correct.

Q. What occurred then? A. Well we proceeded east as far as—we didn't get quite to 9th Street, on 10th Street I believe, on North Avenue, and it was then that Officer Brazzoni came behind me, and placed me under arrest.

Q. Did he indicate what you were being placed under arrest for? [95] A. Well, the officer who was up yesterday, the first one, mentioned he said this over a bull-horn, I don't recall, this is most likely what happened, he announced that we were in violation of the Mayor's proclamation, we continued to march, we were going to City Hall by the way, to question the Mayor on the proclamation, then Officer Brazzoni placed me under arrest, taking me from behind, by the coat and collar.

Q. That was on 9th and North Avenue? A. That is correct.

Q. And what occurred after Officer Brazzoni had placed you under arrest? A. He walked me to the wagon, there was some scuffling behind me, I couldn't see what was happening.

Q. You, yourself wasn't scuffling? A. No, I was not.

Q. What happened? A. He led me to the—around the front of one wagon, but then it was quite a distance from where he walked me east to where we had to come back west, around the wagon, I don't recall how far, but as we

*Father James Edmund Groppi—Defendant—Direct*

turned around the wagon, I went limp, and officer—Officer Brazzoni began to carry me from the back, and two other officers, one officer by my right leg, and another officer by the left leg, began to carry me to the wagon.

**[96]** Q. How far at the time that you were being carried by the officers, were you from the paddy wagon? A. I don't recall, oh, 10, 15 yards, that is just a general estimate, I don't know.

Q. What happened then? A. Well Officer Miller had me on the right leg, and Officer Buchanan had me on the left leg, and it was then that Officer Buchanan began to intentionally gouge his fingers—

Mr. Lauerman: I object, it calls for an opinion and conclusion.

*By Mr. Jacobson:*

Q. Just say—

The Court: All right, I will sustain the objection, and then just tell if anything, what happened.

The Witness: I was being carried to the wagon, and Officer Miller had me by my right leg, and Officer Buchanan by the left leg, and Officer Brazzoni around the back.

*By Mr. Jackson:*

Q. As you were being carried to the wagon, what happened? A. My foot began to hurt, as if someone were digging their fingernails into my foot.

Q. You felt pressure being applied to your foot, by one of the officers? A. More than pressure, it was a scratching, and I—

*Father James Edmund Groppi—Defendant—Direct*

**[97]** Q. Which Officer was that? A. Officer Buchanan.

Q. He was carrying your left leg? A. Right.

Q. Then what happened? A. I said to Officer Brazzoni, behind me, he is gouging his fingers into my foot.

Q. What happened then? A. He didn't say anything, and the gouging continued, and as I got to the wagon, I said again, he is gouging his fingers into my foot, and I asked, what is that officer's badge number and—

Q. Were you at the back of the paddy wagon when you said that? A. Yes.

Q. Then what happened? A. Then I was placed into the wagon by Officer Brazzoni, Buchanan was still on my foot, and Sgt. Miller on the other foot, they placed me in the wagon, I asked again what is that officer's badge number, he isn't—I noticed he wasn't wearing a badge, I was placed into the wagon, I said to Officer Brazzoni, what is that officer's name, and Officer Brazzoni said, that is for you to find out.

Q. What happened then? A. I was in the wagon, I mentioned to Terry Astuto, secretary there, and—

**[98]** Q. Who is—were there other people in the paddy wagon? A. Yes, the paddy wagon was filled with people, in fact, I was sitting on someone's lap, right there.

Q. You talked to someone in the paddy wagon about what had occurred? A. Yes.

Q. What did you say? A. I mentioned that this police officer was applying pressure to my foot, scratching, digging into my foot, I took off my shoe and socks and showed these marks to some of the people at—

Q. At that time were the doors closed? A. Of the paddy wagon, yes, then I took off my shoe and showed these marks, and then Officer Brazzoni rode on the back of the wagon, I believe.

*Father James Edmund Groppi—Defendant—Direct*

Q. You heard Sgt. Miller, and Officer Buchanan testify yesterday, did you not? A. Yes.

Q. And you heard him say that you had kicked Officer Buchanan in the chest, did you hear that testimony? A. Yes.

Q. Did you kick Officer Buchanan in the chest? A. No, I did react to the pressure placed on my leg, I say I did wriggle my foot and try to get my foot free, because of the pressure on my foot did hurt, but I did not kick [99] the officer in the chest.

Q. You heard the officers, that is, Miller and Brazzoni and Buchanan, indicate that you said, you fuckin' son-of-a-bitch, I want your badge number, did you hear that? A. Yes.

Q. Did you say that? A. I did not use any vulgarity whatsoever.

Mr. Jacobson: That's all, we rest.

Mr. Lauerman: Your Honor, the state requests a very brief conference in Chambers, with Counsel, that way the jury will not have to leave.

The Court: Pardon me.

Mr. Lauerman: That way the jury doesn't have to leave.

(IN CAMERA)

The Court: Mr. Lauerman has asked for a conference.

Mr. Lauerman: Yes, Your Honor, when Father Groppi started testifying, he indicated that around 7 p.m. on August 31st, at St. Boniface Church, they had an assembly discussing the Mayor's proclamation, and how they demonstrated, and that it would probably be in violation of their constitutional rights to march, and some other words that I didn't take

*Father James Edmund Groppi—Defendant—Direct*

down, in my words, words to the effect, it was against their rights, and taking away their rights, the State's [100] objection at that time, the State's objection was on the immateriality of that testimony, when it was offered.

The Court: Right.

Mr. Lauerman: May I have Father Groppi's answer read back.

(Answer read back.)

"Marches were for a fair housing bill, to consider the right of freedom of movement within the confines of our country and also the last couple of days were also in process of what we believed the Mayor, taking our right of freedom of speech and freedom of assembly."

Mr. Lauerman: At this time we believe that testimony is immaterial, in that it had only the effect of inciting emotions in the minds of the jurors, that it is not a fact in this case, and that it was of a prejudicial nature, and would be grounds for a mistrial, and the State would reserve its right to move for a mistrial at a later time, in this trial, on this point, and of course if the testimony of other witnesses, any other witnesses would be to the same effect, the State, well of course will make renewal of the same objection and of the same motion at that time.

The Court: All right.

Mr. Jacobson: May I respond, Your Honor, the [101] defense, may I respond in the record. The defense's position is that the State wants its cake and eat it, too, on two basis. One, prior to this trial, the Defense Counsel approached the Assistant District Attorney, John Lauerman, and in fact indicated to John

*Father James Edmund Groppi—Defendant—Direct*

Lauerman, that Defense Counsel saw no way that this case could be tried without the Mayor's proclamation at issue, in that the resisting arrest and the Mayor's proclamation is so closely intertwined, it is impossible to separate out the two matters. Therefore, the Defense Counsel asked John Lauerman, and talked to the District Attorney Hugh O'Connell. Furthermore, because the Mayor's proclamation was at issue, Defense Counsel saw no way to proceed, without putting the Mayor of the City of Milwaukee under subpoena, that the Defense Counsel asked John Lauerman to tell that to Hugh O'Connell, and to ask the State to join the Defense Counsel in putting the matter over, until the Federal Court had determined the constitutionality of the Mayor's proclamation. John Lauerman informed Defense Counsel that the position of—Hugh O'Connell said that the case should proceed on the date that it was set for, and the Defense Counsel should subpoena whatever witnesses was necessary, to establish his case, that is point one. Point two, Defense Counsel objected to the Mayor's proclamation being put in evidence, during the State's case, on the basis that it was immaterial, that [102] request, that objection was overruled, the Court specifically allowed the proclamation to be put into evidence. Now, the Mayor's proclamation has been put into evidence, there is testimony that was put in the record by two police officers, who knew nothing about the resisting offense, the Court ruled that it was material on the basis that it had to do with the Mayor's proclamation, now Defense Counsel attempts to put in some testimony, by his witnesses regarding the Mayor's proclama-

*Father James Edmund Groppi—Defendant—Cross*

tion, and the defense witnesses' reaction to that proclamation, and the State comes in and all of a sudden, this is immaterial, it is prejudicial, it has grounds for mistrial, the State wants their cake and eat it, too. They want to put in all their testimony on the basis that the Mayor's proclamation is a lawful order, and police officers wanted people to obey that particular proclamation, and in fact it wasn't obeyed, and arrests occurred, resisting followed, now when Defense Counsel wants testimony on that subject matter, State wants to preclude defense to do so, our position is that it is all very material to the proclamation.

The Court: We will proceed with the trial, I understand there are thin lines, but I will clear up any matters that may arise, so I don't think this concerns either side, if Mr. Lauerman objects, and reserves his ruling for a mistrial, fine, I will allow that, okay.

【103】 (In Open Court)

(Jury Present)

Mr. Lauerman: May I have two minutes?

The Court: All right.

*Cross-Examination by Mr. Lauerman:*

Q. Father Groppi, you testified that you began your march a little after 7, 7:15, 7:30? A. Yes, I don't recall the exact time it was, I guess it was early evening.

Q. And you testified that you remembered a police officer with a bull horn, reading something? A. I don't even remember that, it's a possibility this is what happened, because this is what the Police Department does when it wants people to know about violations of some law.

Q. Were you at the front of this march? A. Yes.

*Father James Edmund Groppi—Defendant—Cross*

Q. Do you remember seeing Inspector Ullius, or a member of the Police Department with a bull horn? A. No, I don't.

Q. You don't remember, you don't remember specifically, a police officer using a bull horn? A. No, I don't, I'd say it is quite possible that he did.

**[104]** Q. You say you got to 10th and North, where Officer Brazzoni placed you under arrest? A. Between 9th and 10th and North, yes.

Q. Were you still at the head of the line, at that time? A. Yes, I was.

Q. And did he tell you, that he was placing you under arrest for the violation of the proclamation? A. Yes, I believe he did.

Q. Was he the only officer in your immediate presence at that point? A. Yes, I could not see behind me, he had a very firm grip on the back of my coat, I couldn't turn around.

Q. He stated words to the effect, Father come with me so you won't get hurt? A. Yes, he said something, Father don't worry, no one is going to hurt you, and he grabbed me very firmly.

Q. And he directed you to go with him? A. Yes.

Q. And then did he alone, begin to walk you toward the wagon? A. Yes.

Q. Now did any scuffle ensue in the immediate presence of yourself and Officer Brazzoni? A. I did not see any, I could not turn around, there was some scuffling going on behind me, as soon as Officer Brazzoni grabbed me, but I could not see what went on **[105]** behind me.

Q. Did Officer Brazzoni have you by one of your arms? A. Not at this particular point, I don't believe, he just had me very firmly, behind the coat and by the collar.

*Father James Edmund Groppi—Defendant—Cross*

Q. Did anyone grab you by either of your arms? A. I don't recall.

Q. It could have happened? A. Could have happened.

Q. Did you feel some tugging going on with your body, by any individuals? A. I don't recall.

Q. You don't recall that, how far were you would you estimate from the wagon when Officer Brazzoni first placed you under arrest? A. It was quite a distance, I couldn't give an exact estimate of the distance, I remember we walked further east on North Avenue, and then, I believe we walked around one police wagon, we had to come to a second one, that was parked behind it, so we walked east on North Avenue around some vehicle, and walked west on North Avenue to another vehicle.

Q. Okay, I'd like to ask you this question, how far did you walk with Officer Brazzoni, before you went limp? A. Oh, I would give an estimate of approximately 20, 30 yards, I could not give an exact distance here.

[106] Q. And after walking with Officer Brazzoni for 20 or 30 yards, what caused you to go limp, why did you go limp?

Mr. Jacobson: I object to that Your Honor, it's not material.

The Court: Overruled, you may answer that.

The Witness: I was arrested a number of times in Civil Rights demonstrations, going limp, does not constitute resisting arrest, and I went limp.

*By Mr. Lauerman:*

Q. Did you sit on the pavement? A. Well, when you go limp, you just let your body go limp, I don't think I reached the pavement, Officer Brazzoni prevented me from completely going to the pavement.

*Father James Edmund Groppi—Defendant—Cross*

Q. And then Officer Brazzoni grabbed the upper part of your trunk, of your body? A. My chest, yes.

Q. And Sgt. Miller and Officer Buchanan grabbed your legs? A. Right.

Q. One on each leg? A. Right.

Q. How far from the wagon were you at this time? A. I would say, about 20 yards.

Q. After Officer Brazzoni, and Sgt. Miller and Officer Buchanan picked you up, to take you the rest of the way to the wagon, did you kick at all, on the way to the wagon?

【107】A. No, I did not.

Q. You didn't kick at all? A. No, I did not.

Q. Did your body squirm? A. No, I did not, I went limp.

Q. In other words you—it's your testimony that you remained entirely limp? A. Limp.

Q. Didn't really move? A. I did not move, or wiggle, or try to get away from the police officers, I went limp.

Q. How many hands—strike that—did Sgt. Miller use both of his hands to maintain his grip upon you? A. I don't remember, he had me by the right leg, whether or not he had both hands on me, I don't recall.

Q. Did he have you high on your leg, up above the knee, or down near your ankle? A. I don't recall that either, I know he had my right leg.

Q. Did he have anything else in either of his hands? A. I don't recall.

Q. Did Officer Brazzoni, did you feel Officer Brazzoni change his grip upon you at any time, during the course of your walk to the wagon? A. Well no, after I went limp, he took me by the chest, I didn't feel anything.

【108】Q. Did you feel him losing his grip upon you at any time? A. No.

*Father James Edmund Groppi—Defendant—Cross*

Q. Would you have slipped from the grip that he had on you, at any time? A. No.

Q. In other words he maintained one steady grip? A. Yes.

Q. Did Sgt. Miller lose his grip on your right leg at any time, that you can remember? A. No, not that I can recall.

Q. Did Officer Buchanan lose his grip on your left leg at any time that you can remember? A. No.

Q. On your way to the wagon? A. No.

Q. You were wearing normal clothing, is that correct, in other words you had pants, shoes and socks— A. I was dressed.

Q. Just about like you would be, here in Court? A. Right.

Q. So you were fully clothed? A. Certainly.

Q. Then as you got to the wagon, you felt this discomfort, is that correct? A. I felt a gouging in my foot with fingernails.

[109] Q. Well now, you said you felt gouging with fingernails, did you see anybodies hands, did you see the hands that were holding your legs? A. Yes, I did.

Q. You could see them? A. Yes.

Q. So your head was higher than your legs? A. Yes.

Q. You were on a slant? A. Right.

Q. With your head higher than your feet? A. Right, Officer Brazzoni is much taller than Officer Buchanan.

Q. Did Officer Buchanan have anything in his hands? A. Not that I recall, he had both arms around my foot, his hands at the end of my leg.

Q. You say both arms around your feet? A. No, he had his hands around my ankle.

Q. Was he just holding you, within his hands? A. Something similar to the motion that you just made.

*Father James Edmund Groppi—Defendant—Cross*

Q. In other words holding kind of like this? A. Right.

Mr. Jacobson: Would you describe that, for the record.

Mr. Lauerman: For the record, I am extending my hands before my body, just my hands, in a fashion whereby [110] you would hold a round object in your hands.

*By Mr. Lauerman:*

Q. When you first felt something at your left foot, did you begin moving that leg, your left leg? A. I wiggled it slightly.

Q. And I think it was your testimony, that you asked Officer Brazzoni, or told, Officer Brazzoni what was happening? A. Yes, I said, hey, that police officer is digging his fingers into my foot, I told him to stop it.

Q. Did Officer Brazzoni hear you, or do you know? A. He sure did.

Q. He did, was there a lot of noise around the wagon? A. Somewhat, not too much.

Q. Was there noise coming from the direction from where the rest of the marchers would be, at this time?

A. There was some noise, but he could hear very distinctly, there wasn't that much noise.

Q. And you told him twice, is that—was that your testimony, before you got to the back of the wagon? A. Yes, I don't recall how many times I said it, hey, that police officer is digging his fingernails into my foot, tell him to stop it, and then saying, what is his badge number, but he was not wearing a badge, makes it very difficult to identify people.

Q. Wouldn't he had to, if he was using his hands in the manner [111] you described, wouldn't this be through your sock? A. Pardon?

*Father James Edmund Groppi—Defendant—Cross*

Q. Would this be through your socks, that he was doing this? A. Yes.

Q. All right, now when you got to the back of the wagon, was the door of it open? A. Yes, I believe so.

Q. You said when you got into the wagon, it was filled up? A. Correct.

Q. So if the door was opened when you got there, you probably saw individuals in the wagon, as you were behind the wagon, is that correct? A. I was placed in, back first.

Q. So you didn't see— A. I didn't see much, or who was in there.

Q. As you came around the corner to the back of the wagon, were you able to observe into the wagon? A. No, I was looking at my foot, and complaining to the officer who was carrying me, something was happening to my foot, I wasn't paying too much attention to the wagon.

Q. Did you hear any voices coming from the wagon? A. I wasn't paying attention to that, I don't recall.

Q. Was there noise at that place, behind the wagon, in other words, was there a lot of noise behind the wagon, as you got there? [112] A. I don't recall, there was some noise in the area, because of all the arrests going on, but I don't recall how noisy it was.

Q. Now, you freed your left leg, before Officer Buchanan released his grip, is that correct? A. No.

Q. So it is your testimony, that he entirely released his grip upon you before—strike that—isn't it a fact, that you did pull your left leg from Officer Buchanan, before he released it? A. No.

Q. And isn't it a fact also, that you did kick out with your left foot? A. No.

Q. Did you see Officer Buchanan on either his left, or right knee, at any time? A. No.

*Father James Edmund Groppi—Defendant—Cross*

Q. You didn't see him, in a crouched position? A. No, after I was—

Q. Just answer the questions Father. It is your testimony that your foot did not make contact with his chest at all? A. That is correct.

Q. And it is your testimony, you at no time, used any words that may be characterized as vulgar? A. That is correct.

【113】Q. Just before being placed in the wagon, did you make a sudden movement of your body? A. I don't recall, I know I was wiggling my foot, and trying to get it away from the gouging in my ankle.

Q. Now wiggling, wouldn't ordinarily— A. I don't recall, how did you explain it, jerking foot?

Q. A jerking motion with your body, you don't recall making one? A. That is correct.

Q. Normally, just wiggling a foot couldn't cause a sudden jerk of the body? A. This is true.

Q. Did Sgt. Miller also release his grip of you, prior to you being put into the wagon? A. Not prior to, and I was placed in the wagon, then the officers released me.

Q. Well did they, the three officers, sort of lift you up into the wagon? A. That is correct.

Q. And you went right into the wagon? A. Right.

Q. So then at no time did your feet touch the ground? A. No.

Q. And while they were lifting you into the wagon, did either your left foot, or your right foot, go below the waist of 【114】 Officer Miller and Officer Buchanan, in other words, did they put your feet down a little bit, down towards ground level? A. I don't recall, I remember Brazzoni was on my back lifting me backwards in the wagon, the other officers were on my feet, and that is the way I went in.

*Father James Edmund Groppi—Defendant—Cross*

Q. Did you, at any time, direct any statement toward Sgt. Miller at the wagon? A. I did not.

Q. Sgt. Miller had a uniform on that night, is that correct, Father? A. Yes.

Q. And it showed his sergeant stripes, isn't that correct? A. I believe so.

Q. Normally, wouldn't you make any complaint that you might have, to the sergeant?

Mr. Jacobson: I don't understand that question, I don't think it is, you know, specific enough in terms of what you're talking about.

*By Mr. Lauerman:*

Q. You testified Father, you told Officer Brazzoni, about certain goings on, as you were being carried to the wagon?

A. I did not think about it, my foot was hurting from the gouging, I made the remark to Officer Brazzoni.

Q. Did you refer to Officer Brazzoni by name? [115] A. No, I didn't know his name, at that time.

Q. Well, did you turn your head backwards, so you were facing him? A. No, I don't recall doing that either, I said, he is gouging my foot with his fingers, into my foot.

Q. Well then, how would you—why did you testify that it was Officer Brazzoni to whom you directed your comment? A. Because I felt I was talking to him, he talked to me earlier, don't worry Father, no one is going to hurt you, I thought I would take him up on his assurance.

Q. Isn't it true, that what he said earlier to you was, he asked you to walk with him to the wagon? A. I don't think he said walk with me to the wagon, he said Father you're under arrest and he grabbed me behind the collar, and then there was some kind of a bump behind me, knocking,

*Father James Edmund Groppi—Defendant—Cross*

he said, don't worry Father, no one is going to hurt you, according to his testimony, it was some Youth Council member.

Q. Didn't he say, come with me, nobody is going to hurt you? A. Yes, something like that, come with me Father, no one is going to hurt you, I thought, police officer, certainly the Youth Council member was not going to hurt me.

Q. But certainly, at that time, the understanding was that you would walk with Officer Brazzoni, isn't that correct? A. He did not say that I should walk with him.

[116] Q. And you can understand, can't you, if you do go limp, and people have to pick you up—

Mr. Jacobson: I am going to object to the form of your question.

*By Mr. Lauerma n:*

Q. Isn't it correct, if you do go limp, and it is going to require several officers to pick you up, and it is going to be a little bit more difficult for things to be handled in a manner that you think—

Mr. Jacobson: I object, it calls for a conclusion.

The Court: Answer if you can, if you can't answer it, you can't.

Mr. Jacobson: It's repetitious, all—

The Witness: I did not think of it at this time.

Mr. Lauerma n: That's all.

The Court: You're excused.

*Terry Astuto—for Defendant—Direct*

TERRY ASTUTO, called as a witness on behalf of the Defendant, being first duly sworn, on oath testified as follows:

*Direct Examination by Mr. Jacobson:*

Q. Would you state your name? A. Terry Astuto.

The Court: How do you spell that last name?

The Witness: Astuto, A-S-T-U-T-O (indicated spelling).

**[117]** *By Mr. Jacobson:*

Q. Where do you live Terry? A. 1527 North Marshall Street.

Q. Is that in the City and County of Milwaukee, State of Wisconsin? A. Yes, it is.

Q. Did you have occasion to be placed in police custody, on the night of August 31st, 1967, for violation of the Mayor's proclamation? A. Yes.

Q. And where were you placed in custody, when you were arrested for violating the Mayor's proclamation? A. On North Avenue, between 9th and 10th Street.

Q. Did you have occasion to be placed in some police conveyance, during the course of that evening? A. Yes.

Q. What kind of a conveyance were you placed in? A. That—I think they call it a paddy wagon.

Q. Where was that paddy wagon located on that night? A. It was on North Avenue, between 9th and 10th, a little bit east, of where I was arrested.

Q. Where were you in the paddy wagon, when you were placed inside of it? A. I was the last one, on the right side, in other words not the driver's side, in the back of the door.

*Terry Astuto—for Defendant—Direct*

**[118]** Q. Could you state, whether that paddy wagon had a number of occupants in there? A. Yes, it had very many.

Q. Could you tell me, in terms of capacity, was it filled, half filled, or— A. It was more than full.

Q. And when you were in that paddy wagon, where you indicated you were placed, in that paddy wagon, did you have occasion—strike that—about what time of the evening was that, do you recall? A. It was approximately 7:30.

Q. 7:30, 8 o'clock? A. No, 7:30.

Q. Now you were present in the Courtroom, were you not, when police officers testified as to certain arrests that took place in the vicinity of 9th and 10th, on West North Avenue, for violation of the Mayor's proclamation? A. Yes, I was.

Q. Is that what you were in custody for? A. Yes.

Q. Inside the paddy wagon, did you have occasion to see Father Groppi at any time, while you were inside of the paddy wagon? A. Not until he was brought to the rear of the wagon.

Q. Did you have occasion to see him then? **[119]** A. Yes, I did.

Q. And could you describe exactly, when you first saw Father Groppi, what position was he in? A. He was being held by some officers.

Q. What were the officers doing with him? A. They were carrying him to the wagon.

Q. And you saw that? A. Yes.

Q. Did you see the officers carry Father Groppi to the paddy wagon? A. No.

Q. In other words did they— A. When he got to the rear of the wagon.

Q. The officers came around from the side of the paddy wagon? A. You see the doors had been closed before, then

*Terry Astuto—for Defendant—Direct*

when they opened, you could see Father out there, you couldn't see—we saw him coming towards us.

Q. When the doors were open, you did see Father Groppi? A. Yes.

Q. Was he in a horizontal position, were the officers holding Father Groppi in a horizontal position when you first saw him? A. Yes.

Q. And what happened after you saw him in that position? A. Well then, they brought him closer to the wagon, the officer [120] carrying the top part of the body, put his back up against the wagon, put it—that is just where it would have gone, some of us pulled him by the shoulders, and then he was just lifted into the wagon.

Q. And did you have—were there several officers carrying Father Groppi to the paddy wagon? A. Yes.

Q. Now when you were looking at Father Groppi being hoisted into the—or being lifted into the paddy wagon, did you have an occasion to get a good full view of Father Groppi, at that time? A. Yes, I was standing by that time.

Q. You heard the officers testimony in this Courtroom yesterday, did you not? A. Yes, I did.

Q. One of the officers testified, he was holding Father Groppi's left leg, at the time they got to the back of the paddy wagon, he kicked his leg loose, and he brought it back, and he kicked this particular officer in the chest, and that the officer went down on one leg, did you hear that testimony? A. Yes.

Q. Did you see anything like that happen? A. No, I didn't observe anything like that.

Q. Did you see Father Groppi kick any officer? [121] A. No, I didn't.

Q. You heard several officers testify as to some vulgarities that Father Groppi was to have uttered at the police

*Terry Astuto—for Defendant—Direct*

officer that had placed him in the paddy wagon? A. Yes, I heard.

Q. Did you hear any such vulgarities? A. No, I didn't.

Q. Did you hear any conversation between the officer and Father Groppi at all? A. Yes.

Q. Would you state what that conversation was? A. The first thing, he was coming—or to the wagon, Father said, that man is gouging out my foot, the man is gouging out my foot, I want that man's badge number.

Q. You heard Father Groppi say that? A. Yes.

Q. Was that fairly loud, could you hear that? A. Yes.

Q. And then did you hear any other conversation? A. Not until after he was placed in the wagon.

Q. After Father Groppi was placed in the wagon, then what happened? A. Then the doors were closed, and Officer Brazzoni, I didn't know him then, he got on the back, and Father was looking out the window, and Officer Brazzoni said to him, what's [122] wrong Father, are you nervous, and Father said, that man was gouging out my foot, I want that man's badge number, what is his name, and the officer on the back said, that is for you to find out Father.

Q. Did you see Father Groppi do anything else when he was placed in the paddy wagon? A. Yes, as soon as he got in, he took off his shoe, and pulled his sock down.

Q. And what? A. Pulled his sock down.

Q. Did he say anything? A. Father said, look at that, that man was gouging my foot.

Q. Did you take a look? A. Yes, I did.

Q. All right, at any time, that you had an opportunity to observe Father Groppi, from the time that he was brought to the paddy wagon, and the door was open, did you hear Father Groppi swear at anybody? A. No.

*Terry Astuto—for Defendant—Cross*

Q. And did you see him kick any officer? A. No.

Mr. Jacobson: That's all.

*Cross Examination by Mr. Lauerman:*

Q. Is it Miss or Mrs. Astuto? [123] A. Miss.

Q. You say you were one of the last ones, put into that paddy wagon? A. I was not one of the last ones, but I was the last one seated.

Q. The last one seated? A. Yes.

Q. Were several more placed after you? A. Yes, that's true, they were thrown to the back.

Q. Where was this seat that you say you were sitting on? A. Well, the only way I can describe it, I was on the side of the wagon, opposite of the driver's side, I was in the back, on the bench, the last one next to the door.

Q. And so, your back would be— A. My back would be, have been facing south.

Q. It would be facing the side of the paddy wagon? A. That is true.

Q. And you were looking in the direction of the others? A. If it had, had normal capacity, it was—I was tilted to the side, so my vision would have been more easterly.

Q. More towards the back of the wagon? A. Yes.

Q. Now was the door, did the door remain open during the—did the doors of the paddy wagon, the rear doors, remain open during the entire time the people were being [124] brought in? A. No, they were—the wagon was filled, and the doors were closed, and they opened, and they threw in one of the Commandoes, and they closed the doors, and another one—and then they opened them again, and the next person in, was Father Groppi.

Q. So you say the doors were closed prior to Father

*Terry Astuto—for Defendant—Cross*

Groppi being led to the back of the wagon? A. That is correct.

Q. And then they opened the doors just before Father Groppi was put in? A. When they opened the door, Father wasn't there yet, there were approximately 10 policemen, there could have been some one else, I just saw the policemen.

Q. Now was anyone standing in the wagon, between yourself and the rear door of the wagon, in other words, was anybody obstructing your view to the rear of that wagon, at all? A. No, they couldn't have, if they wanted to.

Q. Were a lot of people within the wagon saying things? A. Yes, they were.

Q. Would you say there was a lot of noise coming from that wagon? A. There was noise, I wouldn't say—it wasn't a great noise, there was a noise.

Q. A lot of hubbub, lot of comments, and what not? [125] A. Well, mostly singing freedom songs.

Q. Do you have an estimate of about how many people were in that wagon? A. Well, an estimate would be, there might have been 15 or 16, I really don't know.

Q. Could have been more? A. I don't think it could have been more, it could have been a couple less, it seemed very full.

Q. And they were singing, some were looking out the windows, depends on what you did.

Q. Were you singing songs? A. No, I was not singing songs.

Q. What were you doing just prior to the time that you saw Father Groppi behind the wagon? A. I was looking out the window.

Q. Looking out the rear window? A. Yes, that was a little fence.

*Terry Astuto—for Defendant—Cross*

Q. When—after the doors were open and you saw Father Groppi coming, being carried behind the wagon, how many officers were carrying Father Groppi? A. I couldn't tell, there were too many.

Q. So there were several police officers standing behind the wagon? A. Yes.

【126】 Q. Now, if you don't know how many officers were carrying Father Groppi, and if there were a lot of officers standing behind the wagon, then at certain times during which Father Groppi was behind the wagon, your view could have been obstructed, is that correct? A. No, it isn't.

Q. Then if your view wasn't obstructed, you would normally know, how many were carrying him, isn't that correct? A. I just didn't notice.

Q. You just didn't notice how many were carrying him? A. That is correct, I knew one, by the top—what else was being done to him—but my view wasn't obstructed at all.

Q. Did Officer Brazzoni who was carrying the top part of his body, at any time, obstruct the view of the rest of Father Groppi? A. I am not sure, I wouldn't say he did.

Q. But you're not sure? A. I don't recall he did.

Q. But he could have obstructed your view of Father Groppi somewhat, at some part of that time, isn't that correct? A. He could have obstructed a little, they were carrying Father, however, they got Father to the wagon, so there were no police, Father's head was on the wagon, he couldn't have obstructed my view, in other words, he was over to 【127】 the side by that point.

Q. Now as they lifted Father Groppi up into the wagon, you got up to help? A. That is correct.

Q. And other people within that wagon came to help to lift him into the wagon also? A. That is correct.

Q. So we could safely say you were mainly interested in

*Terry Astuto—for Defendant—Cross*

helping him to get in—into the wagon at that point in time? A. That is correct.

Q. So you were not really looking at, for instance, the police, and feet, as much as you were to get a good grip on the top part of his body, that Officer Brazzoni was lifting into the wagon? A. Well, I suppose you could say that, but I would have noticed anything unusual in motion.

Q. Now is it your testimony that he didn't twist at all? A. There were body movements.

Q. There was kicking? A. I wouldn't call it—

Q. Well he was— A. His body was making movements, that is correct.

Q. But that is not— A. In other words I couldn't see any voluntary action on [128] Father's part, he wasn't moving, but his body was.

Q. You say that you would probably, normally, notice anything unusual? A. That is correct.

Q. You might not have? A. I think it would have been—it's kind of inconceivable to me not having noticed something.

Q. You think you would have? A. I—put it this way, I am morally certain I would have seen something.

Q. But here you're trying to get a grip on Father Groppi's shoulder, and what not, yet you could observe everything? A. I could, that was happening with Father.

Q. You think you could? A. I feel pretty morally certain I could have.

Q. Now, there was singing you said, coming from within the wagon? A. It stopped when they started bringing Father over.

Q. Were there any shouts coming from within the wagon, directed out of the wagon, as Father Groppi came up? A. Yes.

*Terry Astuto—for Defendant—Cross*

Q. There was quite a few, weren't there? A. There were a number, yes.

Q. And there was some loud ones, weren't there? A. I wouldn't—I mean shouts, I wouldn't say, any louder [129] than a normal shout.

Q. A shout? A. Right.

Q. And so, if Father Groppi—strike that—so if these shouts that were coming from within the wagon, and possibly you may—would not have heard all the things, the things that Father Groppi said? A. It would have been physically impossible to have heard what Father said at that particular moment.

Q. With all the shouts? A. That is true, that is correct.

Q. And was there commotion just outside the door of the wagon? A. There was not too much, only police officers there.

Q. Were any of the police officers speaking? A. I didn't notice that, I don't imagine they were keeping perfectly—I didn't notice any noise coming from them.

Q. You didn't notice whether they were talking? A. No, I didn't.

Q. Did you notice what they were doing? A. Most of them were—well most of them were trying to get Father into the wagon, and they were just around, I don't—

Q. By most of them, how many did you observe? A. Still approximately 10 that I—approximately 10 that were there, you see when they opened the wagon doors, [130] they were suppose to keep us in—I don't know—then they brought Father.

Q. You don't know whether they were saying anything? A. Well, I didn't think about it.

Q. You didn't think they were saying anything? A. That is correct.

*Charles R. Morgan—for Defendant—Direct*

Q. So you didn't hear the officers saying anything, and there were shouts coming from within the wagon, and yet it's your testimony, you are sure that you heard every single word that Father Groppi said? A. I am positive, every single word.

Mr. Lauerman: That's all.

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CHARLES R. MORGAN, called as a witness on behalf of the defendant, being first duly sworn, on oath testified as follows:

*Direct Examination by Mr. Jacobson:*

Q. State your name? A. Charles R. Morgan.

Q. And where do you reside, Mr. Morgan? A. Whitefish Bay, Wisconsin.

Q. And you're employed at the present time? A. I am.

Q. Where are you employed? [131] A. I am a reporter for the Milwaukee Journal.

Q. For how long have you been employed for the Milwaukee Journal? A. Since, January 20th, 1964.

Q. And were you so employed on August 31st, 1967? A. I was.

Q. And during the course of your employment, did you have an assignment that evening? A. I did.

Q. And where was that assignment? A. To cover the open housing demonstrations.

Q. And did you in fact, cover the open housing demonstration that evening? A. I did.

Q. Were you present at St. Boniface Church, or the area where this open housing march, or demonstration occurred on that evening? A. I was.

*Charles R. Morgan—for Defendant—Direct*

Q. Did you have occasion to walk along with the marchers as they left St. Boniface Church and proceeded in the route they were traveling that evening? A. I did.

Q. Were you in the vicinity of 9th and 10th on West North Avenue, during that evening? A. I was.

【132】Q. And were you present when certain arrests were made that evening for violation of the Mayor's proclamation? A. I was.

Q. Did you have occasion to see Father Groppi during that period of time? A. Yes.

Q. When was the first time you saw him? A. When he left St. Boniface Church.

Q. Between 9th and 10th, on West North Avenue, did you have occasion to—strike that—when is the first time you saw him? A. In the line of march, when a police officer seized him.

Q. Could you describe to the jury what happened when this police officer placed him under arrest? A. Father Groppi was walking in, I would say about 6th or 7th back, in the line of march, the officers were ordered to make arrests, they entered the line of march, they seized Father Groppi, and others, many of the marchers—

Q. Just stop there, now after they had Father Groppi in custody, what did they do with Father Groppi? A. My attention at that point, was distracted by other incidents.

Q. Then did you have occasion to see Father Groppi again? A. I did.

Q. What did you see at that time? 【133】A. The next occasion I saw Father Groppi, when he was standing in this center of the street, with several other officers.

Q. And what occurred at that time? A. Father Groppi went limp.

Q. Would you describe what you saw when he went limp?

*Charles R. Morgan—for Defendant—Cross*

A. He relaxed his body, and the officers around him, three, if I recall correctly, picked him up.

Q. Did Father Groppi sit on the street? A. He did not.

Q. In other words, as he went limp he fell into the officers arms, and he picked him up? A. That is correct.

Q. Did you have occasion to see what the officers did with Father Groppi? A. They carried him bodily toward the patrol wagon.

Q. All right, then what happened? A. My attention at this time was distracted.

Q. All right, did you have occasion to see Father Groppi subsequent to that time? A. I did.

Q. And when was that? A. At the very moment he was being hoisted into the paddy wagon.

Q. You did see that? A. Yes.

[134] Q. And did you hear, did you hear Father Groppi hurling any vulgarities, or did you hear him utter, any vulgarities, at that time? A. At no time when I was in the vicinity, did I hear him use any profanity.

Mr. Jacobson: That's all.

*Cross Examination by Mr. Lauerman:*

Q. Now, Mr. Morgan let's get to the time when you saw Father Groppi being hoisted into the patrol—or the paddy wagon, about how far were you, when you observed this taking place? A. At the time he was being hoisted in the paddy wagon, I was standing on the sidewalk, which I estimate is 15 to 20 feet from where the paddy wagon was parked.

Q. Could you, would it be fair to say, there was a lot of commotion at the rear of that paddy wagon, and noise coming from within the paddy wagon? A. There was commotion throughout the area.

*Charles R. Morgan—for Defendant—Redirect*  
*Michael S. Crivello—for Defendant—Direct*

Q. So, Father Groppi could have said things that you couldn't have heard? A. He could have.

Mr. Lauerma: That's all.

*Redirect Examination by Mr. Jacobson:*

【135】 Q. Are you a member of the NAACP? A. I am not.

Q. Were you placed under arrest for any—

Mr. Lauerma: I object, immaterial.

The Court: Overruled, you may answer.

The Witness: I was not.

*By Mr. Jacobson:*

Q. You were strictly there as a Milwaukee Journal Reporter? A. That is correct.

Mr. Jacobson: All right, that is all.

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MICHAEL S. CRIVELLO, called as a witness on behalf of the defendant, being first duly sworn, on oath testified as follows:

*Direct Examination by Mr. Jacobson:*

Q. State your name? A. Mike Crivello.

Q. Where do you reside? A. 4680 North 51st Boulevard.

Q. Is that in the City and County of Milwaukee? A. Yes.

Q. Are you employed at the present time? A. Yes, I am.

Q. Where are you employed? 【136】 A. Chief Photographer, WISN, TV 12.

*Michael S. Crivello—for Defendant—Direct*

Q. Were you so employed on August 31st, 1967? A. Yes, I was.

Q. Are you testifying here, under subpoena? A. Yes, I am.

Q. Now did you have an assignment on the evening of August 31st, 1967, in regard to the duties you performed for your television station? A. Yes, I did.

Q. What was that assignment? A. To cover the demonstrations.

Q. What demonstrations? A. At St. Boniface.

Q. Did you so cover the demonstrations on the evening in question? A. Yes, I did.

Q. Did you have occasion to be present in the vicinity of 9th and 10th, on West North Avenue, on the evening of August 31st, 1967? A. Yes.

Q. Did you see Father Groppi at any time? A. Yes, I did.

Q. Tell the jury, the circumstances when you saw Father Groppi? A. The first time I saw Father Groppi was on 9th and 10th.

Q. In that area between 9 and 10th on West North Avenue? [137] A. I had a sound camera on my shoulder, and when I—the first time I saw him, had any occasion to look for him, I heard some noise, and I looked in the general direction of the noise, and I could see that someone was being arrested, looked like, that is a conclusion on my part, looked like somebody was being arrested, I ran to the area that Father Groppi had been taken into custody, that is the first time.

Q. Did you have occasion to see him again after that? A. Yes, I followed, I believe we turned east and I had the camera on him, then we turned west, and I lost him.

Q. When you say you followed him, could you describe under what circumstances Father Groppi was in, at that

*Michael S. Crivello—for Defendant—Direct*

time? A. The first time I saw Father Groppi, he was walking, and the next time, he was being carried, I did not see—

Q. By several police officers? A. I can't even recall by how many.

Q. But he was being carried by some police officers? A. Yes, he was.

Q. Go ahead, what happened after you lost contact, did you have occasion to see him again? A. Yes I—I lost contact two or three times, he would go one way, turn around, you couldn't follow, I picked a spot at the paddy wagon, about 15 feet away, I organized myself, they brought Father Groppi around, and placed him in the [138] paddy wagon.

Q. You did have occasion to see that? A. Yes, I did.

Q. Did you see him, trying to, or kick any police officer at that time? A. No, I didn't.

Q. Did you hear him shout any vulgarities? A. I heard a lot of noise I couldn't—difficult whether any vulgarities or not.

Q. From Father Groppi? A. I wouldn't say from Father Groppi, there was a crowd there.

Q. Were you in a position to see Father Groppi when he was being placed in the paddy wagon? A. I saw nine, ten percent of it.

Q. You didn't see him kick any police officer in the chest? A. I wasn't looking necessarily in that direction.

Q. Did you see him kick any police officer in the chest, when you were, looking in that direction? A. No, I didn't.

Q. Did you finish your assignment that evening? A. No, I didn't.

Q. What happened? A. I was struck by something, or someone.

Q. What manner? [139] A. Pardon me?

*Michael S. Crivello—for Defendant—Cross*

Q. What manner? A. I received some injuries to my stomach and head, my camera, I don't know—pushed, or I hit it with my knee, and it hit me in the head, and I was unconscious for about five minutes.

Mr. Jacobson: That's all.

*Cross-Examination by Mr. Lauerman:*

Q. Mr. Crivello, I believe it is your testimony that when you did come behind the paddy wagon, you stationed yourself about 15 feet away? A. Yes, I did.

Q. You said you heard a lot of commotion, lot of noise coming from the direction of the paddy wagon, is that correct? A. That is correct.

Q. Did you hear any vulgar words used? A. I heard some, yes, but they were said from behind me.

Q. They were from behind you, not necessarily coming from the paddy wagon? A. I couldn't say, but I would think they were behind me.

Q. But from your position, and because of the noise and the commotion, would it be safe to say, you wouldn't have heard a lot of things that Father Groppi might have said? [140] A. That is true.

Q. And there were several police officers in the immediate vicinity of the back door of the paddy wagon, is that correct? A. That is correct.

Q. In fact two of them as they carried Father Groppi to the back of the paddy wagon, had him by his legs, is that correct? A. I really don't know, I was looking in all directions, I usually point the camera in the direction of the activity and look around, I didn't even—to tell you the truth, I didn't see that much of it.

Q. I see, so then we are safe to say, you may have missed

*Michael S. Crivello—for Defendant—Cross*

a lot of the action behind the paddy wagon? A. That is correct.

Mr. Lauerman: That's all.

Mr. Jacobson: Could we release Mr. Morgan and Mr. Crivello from under the subpoena?

The Court: All right. We will take a short five-minute recess, for the benefit of the ladies and gentlemen of the jury.

(Thereupon a recess was taken.)

(Court reconvened.)

(Jury Present.)

Mr. Lauerman: I would like Your Honor, at this time [141] the question and answer that was objected to, reread, in the—in Father Groppi's direct examination, the question of his Counsel, Mr. Jacobson, concerning what was discussed at an assembly on August 31st, 1967, at approximately 7 p.m., the objection is on the answer that was given.

Mr. Jacobson: I object to that being reread, Your Honor.

The Court: I overrule the objection, let the testimony be reread.

(Reporter reread back answer.)

Mr. Lauerman: I would renew my objection at this time, Your Honor, and ask that the answer be stricken.

The Court: I overrule the objection, let the answer stand, as read originally, and reread.

*Prentice L. McKinney—for Defendant—Direct*

PRENTICE L. MCKINNEY, called as a witness on behalf of the defendant, being first duly sworn, on oath testified as follows:

*Direct Examination by Mr. Jacobson:*

Q. State your name? A. Prentice McKinney.

Q. Where do you reside at the present time? A. 3256 North 10th.

【142】 The Court: How old are you?

The Witness: 20.

*By Mr. Jacobson:*

Q. Is that in the City and County of Milwaukee, State of Wisconsin? A. Yes, it is.

Q. Did you have occasion to take part in a demonstration, on the evening of August 31st, 1967? A. Yes, I did.

Q. Was that—were you in the Courtroom yesterday, when certain officers testified in this case? A. Yes, I was.

Q. During the whole testimony? A. Yes.

Q. Did you hear those officers testify that persons that were taking part in this demonstration on the night in question, were later arrested for violating the Mayor's proclamation? A. Yes.

Q. Were you one of those persons? A. Yes, I was.

Q. Did you have occasion that night, to be placed in a paddy wagon? A. Yes.

Q. Where was that located? A. I don't know, in between 9th and 10th on North Avenue.

Q. And where in that paddy wagon were you placed?

【143】 A. I was by the door, and my back was to the north side of it.

Q. Which way would you be facing? A. I would be facing south, or towards the door.

*Prentice L. McKinney—for Defendant—Direct*

Q. Which door is that? A. The back door, behind the driver.

Q. Did you have occasion, when you were in the paddy wagon that evening, where you were in this regard, to the position that you just testified to, did you have occasion to see Father Groppi? A. Yes.

Q. When was the first time you saw Father Groppi, when you were in the paddy wagon? A. He was being put in, they pushed up his back, and he was put in, he was still hollering about his leg.

Q. You saw him when he was outside the door of the paddy wagon? A. Right.

Q. And what did you see, when you saw him at that time? A. One Officer had him by the back, and one on each foot.

Q. You saw that? A. Yes.

Q. Did you have occasion to—what happened when you saw that? A. Well, they were bringing him into the wagon.

Q. Go ahead, describe what happened? A. Well, the officer that had his back, just came around and [144] lifted his back up, you know, to push him into the wagon.

Q. And then, was he in fact placed in the wagon? A. We helped him a little bit.

Q. You helped him too? A. Yes.

Q. Did you have occasion to hear any conversation between Father Groppi and the police officers? A. I wasn't between—Father was just telling this other officer to make this—this other officer quit gouging his leg.

Q. Did you hear him say that? A. Yes.

Q. Did you hear any—that is what you heard? A. Right.

Q. Did you hear anything else? A. No, he didn't say anything else.

Q. Did you see Father Groppi kick a police officer in the chest? A. No, he didn't kick anybody, he—

*Prentice L. McKinney—for Defendant—Cross*

Q. Did you see him kick anybody? A. No, he didn't kick anybody.

Q. Did you hear him use any vulgar language at the time he was being placed into the paddy wagon? A. No.

[145] Q. Did you see—hear any vulgar language at any time when he was in the paddy wagon? A. Only—make them quit gouging my leg.

Mr. Jacobson: That's all.

*Cross Examination by Mr. Lauerman:*

Q. You were in the paddy wagon, is that correct? A. Yes.

Q. You were towards the rear, towards the door? A. I was right next to the door.

Q. Were you one of the last ones? A. Well, I imagine so, because the paddy wagon was full.

Q. Do you remember other people being placed in after you, prior to Father Groppi being placed in? A. No, I don't, just about the last.

Q. So the best of your memory, you were the last, prior to Father Groppi being put in? A. Right.

Q. Were you sitting down? A. I was standing up.

Q. Now, you were facing south? A. I had my back to the north wall, I was on an angle, because I was standing in the door.

Q. I just want to make sure this is clear, now you said you were facing south? [146] A. Right, on an angle like this, the wall was back here, and the door was here.

Q. So then you were facing more southwest? A. Right, say southwest.

Q. Was there noise coming from that wagon? A. A few freedom songs, so—or so on.

Q. Shouts coming from the— A. Shouts, not necessarily,

*Prentice L. McKinney—for Defendant—Cross*

there—I said just people saying get off my feet—jammed in like sardines.

Q. You wouldn't describe the voices as shouting? A. No, not necessarily shouts, they weren't whispering either.

Q. Did you hear anybody direct any words towards any officer? A. I wasn't really even noticing, I—

Q. Did you direct any words towards any officer, when they opened the door? A. No.

Q. Were you saying anything, were you talking? A. I was singing.

Q. You were singing? A. Yes.

Q. Did you stop singing when Father Groppi was brought to the rear of the wagon? A. Yes, I did.

Q. At what point, as he was being lifted up? A. When I first saw him.

[147] Q. When you first saw him? A. Right.

Q. Prior to him being lifted up? A. Yes.

Q. What were the exact words, as you remember them, that Father Groppi said? A. I am not going to say this is exact, or not exact, I heard something like, stop the officer he is gouging my leg, please, please, stop him.

Q. That is all you heard? A. Right, he was begging the man for mercy.

Q. You're sure that is all the words you heard him say? A. Right.

Q. So then, you didn't hear him say anything about badge numbers? A. No, I didn't really pay any attention, he was saying the man was hurting him, I was interested in that.

Q. So then you didn't hear all the words that Father Groppi spoke? A. Not necessarily—

Q. Just answer the question, you didn't hear all the words? A. I heard them, but they didn't all register.

Q. So you don't remember all the words that Father Groppi spoke? A. Look, I told you—

*Prentice L. McKinney—for Defendant—Cross*

Q. Answer that question. [148] A. No I don't remember a' the words he spoke, I don't—he didn't use any vulgar—

Q. That is not answering— A. The—each individual word—

Q. There was a lot of commotion going on outside the door of the patrol wagon, also when the door was open, is that correct? A. I don't think there was that much.

Q. How many police officers were out there, as you remember? A. I don't know, about five, or six.

Q. You say five or six, and one of them, a rather large officer had Father Groppi by the trunk, the upper trunk? A. Yes.

Q. And he lifted him up, and two more had him by the legs? A. Right.

Q. One on each leg? A. Right.

Q. Isn't it possible that for a period, of some seconds, perhaps you would have been obstructed in your complete view of what was going on? A. No.

Q. You never— A. Because I was right over his right shoulder.

Q. You say you grabbed Father Groppi? A. Right.

Q. Where did you grab him? [149] A. Up under his right shoulder.

Q. Was that—was his right shoulder area free for you to grab? A. Right.

Q. And you looked at the shoulder area? A. I didn't even—was I—was I looking at the man, he was still holler-ing about the man what was holding his leg.

Q. Do you think—strike that—did you see anything else going on, within the immediate area of the back of the paddy wagon, as Father Groppi was being placed into the paddy wagon? A. I wasn't watching.

Q. You weren't watching? A. I was watching him, and the three officers.

*Prentice L. McKinney—for Defendant—Redirect*

Q. Mr. McKinney, have you ever been arrested, and convicted of a criminal offense? A. Let's see, I have, I don't know, maybe once.

Q. Do you know, or don't you know? A. I don't know what you call a criminal offense.

Q. A misdemeanor, felony? A. Well, a misdemeanor.

Q. How many times? A. About three, four times, something like that, like arguing with my girlfriend's mother, and stuff like that.

Q. More than just that? [150] A. What do you mean, by more?

Q. It entailed more? A. No, just argument, disorderly conduct, argument.

Q. All right, Mr. McKinney, I just want you to be very honest, and search your memory, to the best of your recollection— A. Yes.

Q. How many times, we don't know what you were ever convicted of, if you were, about how many times have you been convicted of a criminal offense? A. I really don't know.

Mr. Lauerman: You don't know.

Mr. Jacobson: How many times Prentice, how many times, tell the jury to the best of your recollection, more than four or five, tell them exactly.

The Witness: It's more an four or five, it's more an four or five.

*Redirect Examination by Mr. Jacobson:*

Q. Are you working at the present time? A. Yes.

Q. Where are you working? A. Wisconsin State Employment, and University of Wisconsin.

Q. All right, just tell the jury exactly what your background is, you don't have to keep saying four or five times, just say— [151] A. That is what I said.

*Michael D. Cullen—for Defendant—Direct*

Mr. Jacobson: All right, that is all.

The Court: You're excused.

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MICHAEL D. CULLEN, called as a witness on behalf of the defendant, being first duly sworn, on oath testified as follows:

*Direct Examination by Mr. Jacobson:*

Q. State your name? A. Michael D. Cullen.

Q. Where do you reside? A. 1131 North 21st Street.

Q. That is in the City and County of Milwaukee, State of Wisconsin? A. Yes.

The Court: How old are you?

The Witness: I am 26.

The Court: All right.

*By Mr. Jacobson:*

Q. Now Mike, what do you do? A. I am Director of Casamarraa Refuge House, gives community shelter, it is an association for the community, we live on 21st and Juneau, I also am a teacher at the Employment Service for Project CITE, Community Involvement, Towards Employment, at the Wisconsin State Employment Service.

【152】Q. Now Mike, did you have occasion to be present at St. Boniface Church on the night of August 31st, 1967? A. Yes.

Q. Did you—did you take part in a demonstration that evening? A. Yes, I did.

Q. Were you later placed in police custody, for the violation of the Mayor's proclamation? A. Yes, I was.

Q. Where did that take place? A. I was in the line, which was going east on North Avenue, between 9th and

*Michael D. Cullen—for Defendant—Direct*

10th Street, if I remember properly, and I was about, oh, I would say 30 feet from the beginning of the line, which was headed by Father Groppi, and Commandoes, and other people, when the arrest, when arrests took place, they arrested the beginning of the line, and a number of us in the middle, we came in, and I was arrested with a large group, not as an individual, but as a group, to the paddy wagon.

Q. All right, a number of you were taken to a paddy wagon? A. Yes, which was facing east, which was facing east on North Avenue.

Q. Were you—were you in close vicinity of this particular paddy wagon, as you were in police custody? A. It was in a little more to the south side of the street, [153] but it was even to the center.

Q. And you were actually taken by the police, to a paddy wagon? A. Yes, with a group of people, mostly of whom were white.

Q. All right, were you ever placed in the paddy wagon? A. I was brought to the side of the paddy wagon, this is important, exactly what happened, I was brought to the side of the paddy wagon, with a number of people, and it was during this time that Father Groppi was carried by, and I am trying to recollect, it was four policemen as far as I could see in the beginning, if you can think, the paddy wagon was facing east, he had to come around front of the paddy wagon, in order to get to the rear, we were on the side, and when the other policemen saw Father Groppi coming, there was much excitement, a lot rushed towards him, to put him into the paddy wagon.

Q. Now, when you saw Father Groppi for the first time, he was in the front of the paddy wagon? A. Yes, the front towards the engine.

Q. He was being carried by police officers? [154] A. When

*Michael D. Cullen—for Defendant—Direct*

he was being carried by me, he was limp, very limp, you see, they had to pass by me.

Q. Just answer my questions. A. Okay.

Q. He was being carried by some police officers? A. Yes.

Q. You were able to see this? A. Yes.

Q. Did you see these police officers carry Father Groppi to the back of the paddy wagon? A. Yes.

Q. And did you then see the police officers also lift Father Groppi up into the paddy wagon itself? A. The wagon itself—the door sort of hemmed some of us out, the door had to be opened sideways, and as he went around the paddy wagon, I didn't exactly—put right in the paddy wagon, but it was on the way, remember coming around by the door.

Q. Were you in the back— A. I—

Q. Were you in the back of the paddy wagon? A. Yes, more to the side, than to the back.

Q. Were you in a position to see Father Groppi as he was being carried, and being placed in the paddy wagon? A. Yes.

Q. You were in a position to see that? A. Yes.

Q. All right, at any time that you saw Father Groppi, as he was being carried to the back of the paddy wagon, and being placed in the paddy wagon, did you see him kick any police [155] officer? A. No, I did not.

Q. Did you hear him say anything? A. No, there was no—this is very hard, I have been trying to think back very deeply on this, is that—one of the things that seemed to have happened, was that he did have a foot that was shaking, I didn't see him kick anybody, and he said, my leg, my leg, and that is all I could hear, it was so very vague, very vague.

Q. Did you hear him use any— A. No profanity, no profane language, I am positive of that.

*Michael D. Cullen—for Defendant—Cross*

Q. Were you then placed in the paddy wagon yourself?

A. No, I was not, in fact it was such a hustle, that Father Groppi—the doors were slammed, and we were left, I don't know how many was left on the sidewalk, but a number were left on the sidealk, we were not arrested that night, we were arrested, but we weren't placed in the paddy wagon, so we went free.

Q. You were never charged with the violation of the Mayor's proclamation? A. No, I was not.

Mr. Jacobson: That's all.

*Cross Examination by Mr. Lauerman:*

Q. You said you were on the side of the paddy wagon, as [156] Father Groppi was brought around? A. Side, more to the rear, we were on the sidewalk, part of the sidewalk, not on the sidewalk.

Q. Now, you also testified that you saw him as he was being carried, and you saw him at a point where he would have been near the front of the paddy wagon? A. I was more to the rear, to the side.

Q. When did you first see him? A. I could see him coming all the way down.

Q. How far away from the paddy wagon, were you? A. I was right beside—they passed right—a policeman between me and him, a point between the body, I was probably the closest person to him.

Q. So you were standing right beside the paddy wagon? A. Yes.

Q. When he was brought around the rear of the paddy wagon, didn't the doors obstruct your view? A. It obstructed the view, in the last minute, when he was—

Q. These doors as they open, they swing around the paddy wagon? A. But there were, well—

*Michael D. Cullen—for Defendant—Redirect*

Q. Don't they? A. Okay, yes.

Q. About how wide are these doors? A. Oh, let me see, two and a half feet, three, each door.

**[157]** Q. And if you were standing right beside, then as the paddy wagon door swings around the paddy wagon, that would fairly well obstruct your view? A. It would obstruct, definitely, some of it.

Q. So after that door swung open, your view was quite well obstructed? A. For a time.

Q. So there was a period of time then, that you would probably not even been able to see Father Groppi? A. No, I saw him totally, they had to get by the doors.

Q. No, I mean after they walked around the door, there was a time you didn't see him? A. Yes, right.

Q. You also testified there was much excitement at the paddy wagon, as they were carrying Father Groppi? A. Very much so.

Q. Was there a lot of commotion? A. But I was very much concentrated on Father Groppi.

Q. But there was a lot of commotion? A. Yes.

Q. Also some noise back there? A. There was noise, absolutely.

Q. So it would be safe to say, you may have missed a few words that any one individual would be speaking, at the rear of that wagon, is that correct? **[158]** A. Very, very possible.

Mr. Lauerman: That's all.

*Redirect Examination by Mr. Jacobson:*

Q. As a matter of fact, you didn't hear Father Groppi say any profanity at all? A. Absolutely not.

Mr. Jacobson: Defense rests.

*Armando Brazzoni—for Plaintiff—Direct*

Mr. Lauerman: I'd like about two minutes, Your Honor.

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ARMANDO BRAZZONI, recalled as a witness on behalf of the State of Wisconsin, being previously sworn, on oath testified as follows:

*Direct Examination by Mr. Lauerman:*

Q. Officer Brazzoni, you have previously testified in this trial, is that correct? A. That is correct.

Q. And your testimony was, that you helped Father Groppi to the paddy wagon? A. That is right.

Q. As you neared the paddy wagon, state whether or not—state whether or not you were asked by Father Groppi any questions, or did he make any statement, as you were going around the paddy wagon? [159] A. The only statement he made, was that he wanted that man's badge number.

Q. At what point did that happen? A. This was just as he was entering, being placed in the wagon.

Q. Is that the first statement you heard him make? A. Yes.

Q. State whether or not where was any noise coming from the paddy wagon? A. When was this, after?

Q. As he was behind it? A. Oh yes, definitely.

Q. Was there quite a bit of noise? A. Yes, quite a bit, chanting, name calling.

Q. Did this occur up through the point where he was successfully placed in the paddy wagon? A. Yes.

Mr. Lauerman: That's all.

Mr. Jacobson: We ask this line of questioning be stricken, on the basis, the jury heard all the testi-

*Wilfred Buchanan—for Plaintiff—Direct*

mony before, and the latter part, of the material part of the testimony.

The Court: Let the questions and answers stand, let the jury weigh it one way or the other.

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**[160]** WILFRED BUCHANAN, recalled as a witness on behalf of the State of Wisconsin, being previously sworn, on oath testified as follows:

*Direct Examination by Mr. Lauerman:*

Q. Officer Buchanan, you have testified in this trial previously? A. Yes, I have.

Q. And you have testified that you were one of the officers who was aiding in carrying Father Groppi to the paddy wagon? A. Yes.

Q. And what grip did you have on Father Groppi? A. I had my both hands around his lower part of his leg, or ankle, and in it, I also had my club, my night stick.

Q. State whether or not at any time, you pushed your fingers into his ankle? A. No, I didn't.

Mr. Jacobson: Your Honor, I am going to object, it is totally self-serving, it is repetitious, we heard this all—

The Court: Let the questions and answers stand, let the jury weigh it one way or the other.

Mr. Lauerman: That's all.

Mr. Jacobson: No questions.

**[161]** Mr. Lauerman: State rests.

Mr. Jacobson: Defense rests.

(Jury excused.)

The Court: First of all, I will ask are there any

*Colloquy*

request for the instructions either side wishes to make a matter of record, then after that, we will entertain the motions, and then have the closing arguments to the jury.

Mr. Jacobson: Well we have one request on instructions, on what the offense the jury is to be charged with.

The Court: Have you—

Mr. Jacobson: It's right—

The Court: Let me see it please. I will deny this exact instruction to the jury, because I am going to give an instruction to the jury that is similar to this, at the same time somewhat different, and not in these same words, but your instruction will be made a matter of the record, any other request?

Mr. Lauerman: Only that the standard be read to the jury, Your Honor.

The Court: Any motions on either side, in the absence of the jury, or without the absence of the jury?

Mr. Lauerman: State would have one motion, to renew an objection, but would like that done in the presence [162] of the jury, wherein the Reporter can read back the testimony before the jury.

Mr. Jacobson: Defense objects to that being done at this time.

The Court: I will allow it, and overrule your objection. Do you have any motions you would like to make.

Mr. Jacobson: Well we will, after they make their motion.

(Jury Present)

*Colloquy*

The Court: Anticipating we will run through until 1 o'clock, with the closing arguments and my instructions to the jury, for those of you sitting in the audience, it will be at least 1 o'clock. All right, any other motions now, before the closing arguments?

Mr. Lauerman: State does have one motion Your Honor, and would like the Reporter to read the initial direct examination of Father Groppi, when he was testifying in this case, and more particularly, the point at which Father Groppi testified that he, and several other people were discussing the march.

The Court: Mr. Reporter, will you read that portion back.

(Question and answer read back).

Mr. Lauerman: State would renew its objection [163] to that testimony as being immaterial, and ask that it be stricken.

Mr. Jacobson: Defendant's position Your Honor, the introduction of the Mayor's proclamation into evidence at the request of the State, was objectionable, and therefore, there will be a renewal of the objection to having received that proclamation into evidence.

### The Court's Charge

The Court: I will overrule the objection, as I did previously, and let the question and answer stand. Now ladies and gentlemen of the jury, the State has presented its case to you and rested, the defense has presented its case to you, and rested. I would like to tell you at this time, what the Assistant District Attorney, and the Defense Counsel said at the opening of this trial, what they, would prove to you is not necessarily evidence in this case. Now we arrive where they have their closing arguments to you, and I wish to tell you, that what they, did prove, is not actually evidence in this case. The innocence or guilt of this defendant, is determined by two things, one, by the testimony of the witnesses for both sides, on the witness stand, and then at the conclusion of these closing arguments, my instructions to you on the law in this case. The testimony of the witnesses, on both sides and my instructions to you on the law, and those two things alone, do you determine the innocence or guilt of this defendant.

**[164]** The Court: To these instructions now. I indicated to you previously, that what the Counsels said at the beginning of the trial, and what they said at the conclusion of the trial, is not evidence in this case. The innocence or guilt of this defendant is determined by the testimony of the witnesses on the witness stand for both sides, and apply that testimony, to the instructions to the jury, and the law that I will read to you at this time, and upon these two things alone, you determine the innocence or guilt of this defendant. Ladies and Gentlemen of the jury; at the close of arguments of Counsels in this case, it is the duty of the Court to instruct you upon the principles of law that should guide and govern you in your considerations of the evidence, and in reaching your verdict. It is the duty of you, members of the jury to take the law as

*The Court's Charge*

given in this instruction, and apply that law to the facts in this case, which are properly proven by the evidence, and therefrom, arrive at your verdict. It is your duty to exclude from consideration everything but the evidence received on this trial, and the law as given to you, in these instructions, and from these alone, guided by your soundest reason, and best judgment, reach your verdict. The complaint in this case, charges that State of Wisconsin, Plaintiff, against James Edmund Groppi, Case Number 2-63208, County Court, [165] Misdemeanor Branch, Complaint for Resisting an Officer, in the State of Wisconsin, through the Sheriff, Constable, or any police officer of the City of Milwaukee, "whereas, Wilfred Buchanan, being first duly sworn on oath, states to the Honorable John J. Kinney, as Magistrate, that James Edmund Groppi, the above named defendant, on the 31st day of August, 1967, in the County of Milwaukee, Wisconsin, did unlawfully, knowingly, resist Wilfred Buchanan, a duly appointed and qualified and acting police officer, of the City of Milwaukee in said County, while the said Wilfred Buchanan was then and there engaged in doing an act, in his official capacity, and with lawful authority, to-wit: said Wilfred Buchanan, personally observed said defendant resist Buchanan, at 900 West North Avenue, in the City of Milwaukee, in said County, to-wit: while said defendant was being carried to a police wagon, after being placed under arrest, said defendant began kicking his legs, striking said Officer Wilfred Buchanan in the body with his foot, that said defendant then states to said Wilfred Buchanan, "you fuckin' son-of-a-bitch, I want your number." "Contrary to Section 946.41 of the Statutes, and against peace and dignity of the State of Wisconsin, and prays that the said James Edmund Groppi, may be arrested and dealt with

*The Court's Charge*

according to law, signed Wilfred Buchanan, complainant." To this charge the defendant has pleaded not guilty.

**[166]** The Court: Although there has been testimony concerning the Mayor's proclamation and the arrest thereto, the only charge on which the defendant is before this Court, is resisting an officer, and his innocence or guilt should be solely determined on that singular charge alone. The Statutes of this State provide, 946.41, "Resisting or obstructing an officer, paragraph 1, whoever knowingly resists or obstructs an officer, while such officer is doing any act in his official capacity, and with lawful authority, may be— paragraph 2, in this Section subparagraph a. "Officer", means peace officer, or other public employee, having the authority by virtue of his office, to take another into custody." Reading that Statute where it says, resisting or obstructing, the singular, is resisting an officer, resisting an officer as defined in Section 946.41, provides that, "whoever knowingly resist or obstructs an officer while such officer is doing any act in his official capacity and with lawful authority is guilty of a violation of the Statutes". Before the defendant may be found guilty of the offense of resisting the officer, the State must prove, by evidence, which satisfies you beyond a reasonable doubt, that there were following, the following three elements of this offense. First, that the defendant resisted an officer, two, that the officer was doing an act in his official capacity and **[167]** with lawful authority, three, that the defendant resisted the officer knowingly, that is, the defendant knew or believed that he was resisting the officer, while the officer was acting in his official capacity, and with lawful authority. To resist a peace officer, or police officer, directly, and while he was engaged in a lawful doing of an act, possibly means the resistance directed to the officer personally. The word, knowingly, worth belief that a special fact ex-

*The Court's Charge*

isted. The second element of this offense; that the officer was doing his act in a official capacity and with lawful authority. If you find therefore, beyond a reasonable doubt, that the officer was then in his official act, serving in his official capacity and with lawful authority. The third offense of this—the third element; that the defendant acted knowingly, before you may find that the defendant acted knowingly, knew or believed that the person resisted, was an officer, that the officer was acting in his official capacity, and that the course of conduct would indicate resistance, in the performance of his duties, and that his conduct was resisting the officer, if you are satisfied beyond a reasonable doubt, from the evidence in this case that the defendant knowingly resisted an officer, and that the officer was doing an act in his official capacity, and with lawful authority, then you may find the defendant guilty of the [168] offense of resisting an officer as charged, if you however are not satisfied, then you must find the defendant not guilty of resisting an officer. You are the sole judges of the credibility of the several witnesses, in determining the convincing power of the evidence, and in deciding questions of fact, and in determining the credibility to be given to the different witnesses. You should take into consideration all of the evidence, the character and appearance of the witnesses, the knowledge, sources, and means of information of the several witnesses, their candor, or lack of candor, and the bias, or lack of bias, or interest manifested by them. You have the right to consider the manner of testifying while a witness is upon the witness stand, and the probability of the truth of the matters testified to, when taken in connection with all of the evidence and surrounding circumstances, and you will consider all of the facts and circumstances, as they have been produced upon the

*The Court's Charge*

trial, and determine the convincing power of the evidence accordingly. If you believe that any witness has willfully testified falsely to any material fact in this case, you may on that ground alone, if you see fit, disregard the testimony of such witness as to all other matters, except insofar, as it is corroborated by other credible evidence produced upon the trial, or by facts and circumstances, which may be [169] fairly inferred. Under the law a defendant is a competent witness in his own behalf, the defendant James Edmund Groppi has given his testimony, and you are the judges of the weight which ought to be attached to it, he is directly interested in the result of the trial, in determining the weight to be given to the testimony of the defendant, it is proper for you to take such interest into consideration you are to give to his testimony such weight as under all of the circumstances you think it is entitled to, his testimony is to be considered with all of the other evidence in the case. You should also consider to what extent if any, the interest any other witness on this trial may have in the result of the case, or in testifying in the manner in which he did, and you are to consider to what extent if any, such interest has any influence upon his testimony. You should apply the same tests as to credibility and weight to the testimony of every witness sworn. The burden of proving the defendant guilty of the offense charged, is upon the State, and before you can render a verdict of guilty, the State must prove to your satisfaction, beyond a reasonable doubt, that the defendant is guilty of the offense charged, every person charged with the commission of an offense is, in law, presumed to be innocent, and that presumption of innocence attends throughout the trial, and prevails at its close, [170] unless, overcome by testimony, which satisfies the jury, of his guilt beyond a reasonable doubt. By proof beyond a

*The Court's Charge*

reasonable doubt, is meant such proof as satisfies your judgments as reasonable persons, and applying your reason and judgments to the evidence before you, that the offense charged, has been committed by the defendant, and so satisfies you, as to leave no other reasonable conclusion possible. The reasonable doubt mentioned means, a doubt resting in reason, and it must arise from all of the evidence, or want of evidence fairly and rationally considered, it means an honest substantial doubt, founded in reason and common sense, as applied to the evidence, a doubt for which a reason can be given, arising from either the evidence, or from a want of evidence. In determining the guilt or innocence of the defendant, you should scrutinize the evidence with the utmost care and caution, bringing to that duty, all of the reason and prudence that you would exercise in the most important affairs of life, in fact all of the judgment, care, caution and discrimination that you possess. This is a criminal case, your verdict must be unanimous, two forms of verdict will be submitted to you for your consideration, namely, we the jury find the defendant James Edmund Groppi guilty in manner and form as charged in the complaint, the other, we the jury find the defendant, James Edmund Groppi not guilty. [171] It is for you to determine which one, of such two forms of verdict you will bring in as your verdict. When you retire to your jury room, for your deliberations, let your first order of business be the selection of a foreman, or a forelady, to preside over your deliberations, when you have unanimously agreed upon your verdict, have your foreman, or forelady sign and date the same, and bring it into open Court, while the Court is in session.

(Thereupon jury retired at 1:30).

(Thereupon proceedings were had as follows at 3:30).

### **Request from Jury for Further Instructions**

The Court: The bailiff indicated that the members of the jury had a question to ask the Court, and the legal pad was taken back there to ask what their question was, question handed to me, reads as follows, that at request, "all testimony—of when Father Groppi was picked up in limp position and carried to police patrol wagon." They indicated they want it reread.

Mr. Lauerman: Of course the State's position is, they have heard the facts, all the facts during the course of this trial, to reread any testimony, or give them back at this time, testimony of any given witness, regardless of whether it be for the State or for the defense in this case would tend to high light that testimony, and therefore, no testimony should be reread or given to them.

**[172]** The Court: Any comment by Mr. Jacobson, representing the defendant?

Mr. Jacobson: On this particular question Your Honor, I would agree with the State, that testimony should not be broken up from one point in time, especially in line with the fact, there is further testimony on cross examination, that would have to come in regarding from the time that the defendant went limp, until the time he was placed in the paddy wagon, we can't tell from the state of the record, just where on cross examination all those questions would be, and I think that would have to be read to the jury, as well as what was said on direct, that would be the position of the State, and our position as to this specific question, that the jury would have to be told that any testimony read out of context would not be fair to the positions of either the State or the defense.

The Court: All right.

Mr. Jacobson: How you want to handle that, I am not sure Your Honor.

*Request from Jury for Further Instructions*

The Court: The only problem is, that you have the testimony of one person read back, then the State is going to ask that the portion of another witness be read back, and we will be reviewing the entire testimony, which took us a day and a half to hear. So, you tell the members of the jury, that the testimony heard this morning was [173] very clear as far as the Court was concerned, for both sides, there is no reason for rereading the testimony.

Mr. Jacobson: Why don't you give a copy of that, what you just stated, in writing, so that would only tell the jury, on a written legal pad, which the Court will write out, what should be told, then there would be no comments on the part of the bailiff himself. I think that would be a good way, and both Counsel and I agree, leave the jury impaneled, alone, just so that is read off the legal pad, what the Court's position is on this, we wouldn't have any problem with the hearing, they shouldn't—isn't it true you cannot bring anything, any written matter into the jury room, except what has been marked as evidence, in other words they can't have written statements from the Court or anything—just so it is read off, you only tell the jury the written out portion, that's on the written legal pad, I am sure then, there will not be any paraphrasing. Your Honor, why don't you say, the testimony is already in, and that any part thereof cannot be reread at this time.

The Court: On a legal pad will be the following notation, "the testimony heard this morning was very clear for both sides, and is a part of the record. Therefore, the jury should proceed to deliberate on this matter without the rereading of the testimony." Let the record reflect, that the jury was so informed. I would like to have the [174] Defense Counsel remain here, and the defendant, and the District Attorney, to at least 5 o'clock, then we will go on from there.

*Verdict*

(Thereupon proceedings were had as follows at 5:00)

The Bailiff: Your Honor, Bailiff informs me that the jury has reached a decision in this matter.

The Court: And whatever the decision of the jury is, I want decorum on part, of all parties in this Courtroom.

(Thereupon jury returned at 5:00)

The Court: This is in the matter, State of Wisconsin Plaintiff, versus James Edmund Groppi, charged with a State charge, allegedly, violation of 946.41 of the Wisconsin Statutes, resisting an officer. This trial commenced before this Court and jury, on Thursday, February 8th, this date Friday, February 9th, at approximately 1:30 the case was concluded, and the jury deliberated on this matter. It is approximately 5 o'clock. I will ask the members of the jury if they have reached a verdict in this matter.

The Foreman: Yes, we have Your Honor.

The Court: Have you elected a duly elected foreman, or forelady?

The Foreman: Yes, sir.

**[175]** The Court: Are you foreman, please rise, state your name and address?

The Foreman: Ronald Kruk, 2505 South 8th Street.

The Court: And you are the duly elected foreman of the jury?

The Foreman: Yes, sir.

The Court: Have you reached a verdict in this matter?

The Foreman: Yes, Your Honor.

The Court: Do you have that verdict, will you please read it in Open Court?

The Foreman: We the jury find the defendant, James Edmund Groppi guilty in the manner and form, as charged in the complaint, dated this 9th day of February, 1968.

*Colloquy*

The Court: Please bring me this verdict. State of Wisconsin, Circuit Court, Milwaukee County, State of Wisconsin Plaintiff, versus James Edmund Groppi, being Case Number G-4718, we the jury find the defendant James Edmund Groppi guilty in manner and form, as charged in the complaint, dated this 9th day of February, A.D. 1968, signed—

The Foreman: I signed it, R. J. Kruk.

The Court: Yes, Foreman. Does the members of—does the Defense Counsel wish to poll the members of the [176] jury?

Mr. Jacobson: Yes, Your Honor.

(Thereupon Jury Polled, and all members responded in the affirmative).

The Court: Do either side, starting with the District Attorney, wish to make any comments?

Mr. Lauerman: No.

The Court: Any comments by the Defense Counsel, Mr. Jacobson?

Mr. Jacobson: I am reserving motions after verdict, until Monday at 9, is that correct. I have no comments at this time.

The Court: Pardon?

Mr. Jacobson: I have no comments.

The Court: I wish to thank you for deliberating on this particular case. You're excused at this time, until the date and time that was just read off to you by the clerk. I wish to thank you for doing your civic duty here in this particular case, which of course, is a tremendous responsibility for you to pass judgment on your fellow citizens. So I wish to thank you at this time for your attention, and deliberations on this matter, and you're excused. Thank you very much. This matter will be adjourned at the request

*Colloquy*

of the defendant, for any [177] motions, written motions, to be filed Monday morning in this Courtroom, at 9 o'clock. So the District Attorney be here promptly at 9, Defense Counsel, the Defendant James Groppi be here for motions, and possible disposition, by way of penalty.

. . . . .

STATE OF WISCONSIN,  
COUNTY OF MILWAUKEE, ss.:

I, James J. Thurber, Acting Official Reporter of Circuit Court, Milwaukee County, hereby certify that the foregoing constitutes a true, correct and complete transcript of my Stenograph notes of the testimony and other proceedings taken upon the above entitled action.

/s/ JAMES J. THURBER

**Hearing on Motion to Accept Affidavit of Prejudice**

**[1] RAYMOND W. FLEMING**

Chief Deputy

**F I L E D**

Nov 04 1967

Clerk of Courts  
Criminal-Misdemeanor  
Traffic Divisions

**CHARGE: RESISTING ARREST**

HEARING ON MOTION in the above entitled action held on October 30, 1967, before the HONORABLE F. RYAN DUFFY, JR., Acting Circuit Court Judge, presiding.

**APPEARANCES:**

David J. Cannon—Assistant District Attorney, appearing for the State of Wisconsin.  
Thomas M. Jacobson—Attorney for Defendant. Defendant in Court.

Judith Spanheimer—Official Reporter.

**[2] PROCEEDINGS**

Mr. Cannon: I understand preliminary procedure is to file a brief today. I understand it was filed and Mr. Lauer-  
man couldn't be here; his wife went to the hospital so I'm  
just here representing the State.

Mr. Jacobson: This matter was before the Court on  
October 18th and the Defendant filed an Affidavit of Preju-

*Hearing on Motion to Accept Affidavit of Prejudice*

dice against Your Honor sitting as an acting Circuit Court Judge. That was the first appearance before Your Honor as a Circuit Court Judge. The matter has been made a Circuit Court matter on October 11th, 1967, when Hugh O'Connell, District Attorney in and for Milwaukee County, filed a Demand to have the County Court proceedings transferred to the Circuit Court and the matter was to be tried as a Circuit Court proceeding. The original appearance before Your Honor was on October 18th after Judge Steffes appointed Your Honor as an acting Circuit Court Judge. At that time, we filed an Affidavit of Prejudice which Your Honor refused. There was discussion as to filing a brief on the matter. The Court set this morning at 9:00 o'clock for the parties to hand in their briefs; that is, the State and the Defense. The Defense had their brief in at ten minutes to 9:00; the State furnished me a copy of their brief at three minutes after 2:00. It is a brief brief, however, and if the Court will permit argument on [3] filing an Affidavit of Prejudice—

The Court: Just by way of background here on this matter. This is an alleged violation of Section 946.41 (1) of the Wisconsin Statutes on August 31st, 1967 and there was an Affidavit—an Affidavit of Prejudice was filed against Judge Seraphim in Branch 4, I believe on September 14th, 1967. Then, the case was transferred to this Court, Branch 12, by lots, and the case was adjourned to September 25th, 1967 in this Branch, No. 12, Misdemeanor—Traffic Division. Then a motion for a Change of Venue was filed September 26th, 1967 and the motion was denied on October 2nd, 1967 and a Jury Trial was demanded by the Defendant and this Court set October 19th, 1967 for a Jury Trial and then an officer of the District Attorney asked that a jury of 12 be demanded on October 11th, 1967, pursuant to

*Hearing on Motion to Accept Affidavit of Prejudice*

324.17 (9) of the Wisconsin Statutes. Then on October 18th, 1967, the State of Wisconsin asked that the matter be transferred to the Circuit Court to be tried and determined as a Circuit Court action. Then, on October 18th, 1967, the Defendant appeared before this Court, Branch 12, and asked leave to file an Affidavit of Prejudice after Judge Steffes appointed this Court to sit and hear and determine these matters as a Circuit Court Judge. On October 18th, the Court refused to accept the Affidavit of Prejudice for the only reason that [4] I felt the Wisconsin Statutes under these circumstances didn't provide for it but I granted time to this date, October 30th, for both sides to file briefs on the matter and I received a brief by the Defense and a brief by the District Attorney. Will each side want to make an argument on your briefs as submitted here today?

Mr. Jacobson: Well, Your Honor, the Defense brief is purely a statutory argument. The Statute in this matter being a Circuit Court proceeding is 324.17 (9) and it indicates that any party to the controversy may within ten days after notice that a Jury Trial has been demanded, have the matter transferred to the Circuit Court of the county for trial. Now, much of the brief indicates that this statute according to the Defendant's position is civil in nature, that the proceedings in the Civil Court Sections of the Statute provide in criminal misdemeanor cases for two trials. That if the Defendant is not successful in the County Court proceedings trial, it must be turned over to the Circuit Court so the statute is utilized. However, the Statute 324.17 (9), the second sentence indicates as follows: "Upon the filing of such demand for transfer, the Judge of the County Court shall immediately cause the record and proceedings in the matter to be certified to the Circuit Court and the same shall there be tried and determined as

*Hearing on Motion to Accept Affidavit of Prejudice*

a Circuit Court action," [5] and it proceeds to talk about probate proceedings which really this statute was intended to govern, a probate proceeding. Now, this was when this matter that's before the Court became a Circuit Court matter on the 11th of October when the District Attorney filed this demand to have the matter transferred to the Circuit Court from the County Court and on October 19th, Judge Steffes received the matter, wrote a letter indicating Your Honor was going to be appointed as an acting Circuit Court Judge. We think this is a de novo matter of the time that you became a Circuit Court Judge and we indicated at the outset on October 18th that we were appearing specially on behalf of the Defendant in all proceedings before Your Honor as a Circuit Court Judge and not submitting to the jurisdiction of the Court until this matter of whether you are going to accept an Affidavit is cleared up. We believe that—and in the brief, we point out that if Your Honor takes the position that the County Court proceedings are binding in the Circuit Court Judge, we set up a hypothetical during the last argument before Your Honor, where if you would be sitting as you were originally as a County Court Judge when you received the case on the Affidavit of Prejudice from Judge Seraphim and several motions were filed before you and you denied the motions and then a demand for a jury [6] was made or a right to waive a jury was made in the case and then the District Attorney filed our demand to have the case transferred to the Circuit Court and as soon as Judge Steffes became the acting Circuit Court Judge. According to the logic of Your Honor, if the Court holds the Defendant to only one affidavit because that's what he filed in the County Court proceedings, then to follow that logic further, he would have to take the position then that all proceedings in the County Court become

*Hearing on Motion to Accept Affidavit of Prejudice*

binding on the Circuit Court and we indicated that logic may seem correct if the same County Court Judge becomes the Circuit Court Judge in the same proceedings. However, we take the position that it is quite clear if Judge Steffes knew, he would have kept the case as a Circuit Court Judge, would not be bound by the County Court Motions when the Statute said that the matter should be tried as a Circuit Court action. Nor, would he be allowed to proceed de novo in the matter of arraignment of motions made before him as he saw the law and then to have a jury trial and proceed in the matter as if nothing had occurred in the County Court. The argument is just that basic on the part of the Defense, this is a de novo matter and that all County Court proceedings became annul on the 11th of October when the demand was filed and the case was transferred to the Circuit Court. And at this [7] point, there is nothing before the Court in terms of an arraignment, that is a plea on behalf of the Defendant in the Circuit Court nor are there any Circuit Court motions that have been filed or is there one affidavit that the Defendant is entitled to in the Circuit Court as an original proceeding.

The Court: Did the State wish to make—

Mr. Cannon: Well, just that there is not such thing as a special appearance in a criminal action, and I think the State's position was stated in Mr. Lauerma's brief. Unfortunately, he can't be here, his wife went to the hospital this morning and he had to go too.

The Court: Well, I have the benefit of his brief anyway.

Mr. Cannon: Right.

The Court: In which he stated also that—in communication states, the Defendant cannot now claim he is entitled to file a second Affidavit of Prejudice.

*Hearing on Motion to Accept Affidavit of Prejudice*

Mr. Jacobson: I don't want to comment on the State's brief, only for the purpose, I'm sure that the deceptiveness and the lack of brevity of the facts prior to the conclusion of the State's brief—as Defense counsel, I don't even want to comment on that, to say that an Affidavit of Prejudice against Chris Seraphim was filed and then was transferred to F. Ryan Duffy in the County Court, and therefore, we can't file a second Affidavit. [8] Somewhere or other the State's recitation of the facts has gotten us up to the date of September 14th and as the Court stated in its recitation of the facts and proceedings on the 25th, the 26th of September, then there was a proceeding on October 2nd, a proceeding on October 6th, a proceeding on October 11th, a proceeding on October 18th. I'm just at a loss to comment on the recitation of the facts as set forth by the State, Your Honor, to make clear that we take the position that the recitation is very deceptive and misleading at best.

Mr. Cannon: Well, there is no statement of the facts in the State's brief. The Judgment Roll will reflect what happened not the State's brief. It's a legal issue, it's not a factual issue. It's nonsense that it's deceptive; the facts are in the Judgment Roll. The whole issue is the only thing to be decided here; there is no quarrel with what the facts are, that's part of the record.

The Court: The only thing that entered my mind is that if the statute provides to receive the Affidavit of Prejudice, there is no question that is what I would do but that statute does not provide for it legally. I told you I didn't think I could accept it so it seems to me that the matter was determined when the case came to Branch 12 by lot, that means my name was drawn after a Writ of Prejudice or Affidavit of Prejudice was filed [9] against Chris Seraphim in Branch 4. Then when the matter went to Judge Steffes, he had the

*Hearing on Motion to Accept Affidavit of Prejudice*

choice of appointing—retaining jurisdiction or appointing another Circuit Court Judge, but he elected to sit on this particular matter. If another Circuit Court Judge had entered the picture, you might have another question but, however, where the Court, Branch 12, who had the jurisdiction when transferred by lot was selected to try and determine the matter as the Circuit Court Judge, I don't think an Affidavit would lie under these circumstances because you'd be getting the choice of eliminating the two misdemeanor or County Court Judges which I do not think was intended by the Court or by law so I will decline to accept the Affidavit of Prejudice and I will set a date for motions and the date for trial. If you feel that you wish the matter reviewed within another Circuit Court, another Court, why that certainly is within your province.

Mr. Jacobson: Your Honor, I have a—I have a motion prepared at this time wherein I move to dismiss this matter as a Circuit Court proceeding on the basis that Your Honor the Court, as a Circuit Court Judge lacks jurisdiction over the Defendant in that Section 324.17 (9) of the Wisconsin Statutes wherein the instant case has been transferred from Milwaukee County Court to the present Court sitting as an acting Circuit Court is unconstitutional [10] in its application to the present case inasmuch as Your Honor has refused an Affidavit of Prejudice and that it is unconstitutional, that the Defendant's rights are being violated under the 14th Amendment. Now, if Your Honor wants this motion heard on the date when motions are heard, we will not be proceeding to the Supreme Court until this motion has been heard. If Your Honor wants to right now deny the motion, then we would have what we would consider a complete record for purposes of going to the Supreme Court on your writs.

*Hearing on Motion to Accept Affidavit of Prejudice*

The Court: I will deny the motion to dismiss because of the constitutionality of the statute. I had this in mind here when—may I see my book—

Mr. Cannon: Your Honor, I think you ought to set a date for motion on it. The State hasn't had an opportunity to see the motion.

The Court: It's merely on the constitutionality of the statute which has existed for many, many years, saying I would rather have it tried by another Court.

Mr. Jacobson: If that's Your Honor's intention, that's why I'd like to have him deny it at this time so the record is perfected.

The Court: You ought to make clear what this motion gets at.

Mr. Jacobson: It's primarily—and I want to [11] do this for the benefit of the State to make a complete record here if the Court doesn't want to give time for consideration of brief on this. Your Honor, sitting as an acting Circuit Court Judge at this time, it is our position that you must accept the Affidavit of Prejudice, has denied that Affidavit of Prejudice on the basis of what went on in the County Court. We, therefore, take the position that you are still sitting as County Court Judge and you are not sitting as Circuit Court Judge and the statute if it permits you to sit as an acting Circuit Court Judge and still binds us by our County Court motions, then we take the position that it is unconstitutional in its application, not on its face, but in its application as to the facts of this case as they now stand before Your Honor. That's our position on the record so that we have it very clear because we are going to proceed to the Supreme Court on this matter. We want the Court to know that; we want the State to know that so that we have every opportunity to make the record as they would like prior to our going to the Supreme Court.

*Hearing on Motion to Accept Affidavit of Prejudice*

The Court: Well, as I say, I am sitting here as Circuit Court Judge appointed by Judge Steffes pursuant to the Wisconsin Statutes. I have denied your motion to dismiss. I have declined to accept the Affidavit of Prejudice because I feel that it is not provided for in [12] the Wisconsin Statutes.

Mr. Cannon: Judge, I would suggest as long as the motion has never been filed that the date be set for it. I don't know what the motion is about except what Mr. Jacobson just said and I think it should be reviewed.

The Court: No, I feel it is within the prerogative of the Circuit Court Judge sitting in the Circuit Court to rule summarily or grant a date for motion. I chose to rule summarily here that the motion should be denied. In the absence of that, I think I will set two dates.

Mr. Jacobson: Your Honor, are you adjourned at this time?

The Court: I will set November 7th for arraignment and any other motions by the Defendant; November 14th for any motions by the State and November 21st, 9:00 o'clock in the morning—

Mr. Jacobson: Could that be in the afternoon at 2:00. I have to be in Racine in the morning every Tuesday.

The Court: What date are you speaking of?

Mr. Jacobson: Well, the 7th, you set everything for Tuesday and I have to be in Racine every Tuesday morning. If you make it at 2:00, I could be here.

The Court: All right. November 7th will be [13] set for the arraignment and any motions, further motions by the Defendant. October 14th, any motions in reply by the State. In the absence of anything, the trial will be set for November 21st at 9:00 in the morning in this Court unless directed otherwise.

*Hearing on Motion to Accept Affidavit of Prejudice*

Mr. Jacobson: Well, Your Honor, could I ask that the Court begin the trial date other than on a Tuesday morning at 9:00. I have to be in Racine every Tuesday morning. Could you make it at 2:00 or could you make it a Wednesday?

The Court: That's the only date my calendar will permit for a long time.

Mr. Jacobson: November 21st at 9:00.

The Court: You will just have to arrange your calendar to accommodate this Court.

Mr. Jacobson: I asked the Court if it—

The Court: I have to do it that way, the way my calendar sits as it is.

Okay, that's it.

---

**[14] STATE OF WISCONSIN,  
COUNTY OF MILWAUKEE, ss.**

I, Judith Spanheimer, Official Reporter of County Court, Branch 12, of Milwaukee County, hereby certify that the foregoing constitutes a true, correct and complete transcript of my Stenotype notes of the testimony and other proceedings taken upon the above entitled action.

/s/ JUDITH SPANHEIMER

196a

**Stipulation With Reference to Approval of Transcript**

Case No. G-4718

IT IS HEREBY STIPULATED by and between the respective parties THOMAS M. JACOBSON, appearing on behalf of the Defendant-Appellant, and DAVID J. CANNON, appearing on behalf of the Plaintiff-Respondent, that service of a proposed approval of transcript in the above entitled action is hereby waived and that the foregoing transcript of testimony contains all of the testimony and evidence introduced upon the trial of the action, the decision of the trial court announced orally in open court, and argument upon the defendant-appellant's motion for a new trial.

IT IS FURTHER STIPULATED that the foregoing Approval of Transcript may be signed and settled by the trial judge without further notice to any of the parties.

Dated at Milwaukee, Wisconsin, this 11th day of June, 1968.

/s/ THOMAS M. JACOBSON  
Thomas M. Jacobson

/s/ E. MICHAEL McCANN,  
David J. Cannon  
Asst. D. A. for  
District Attorney Milwaukee County

## CERTIFICATE

And because the foregoing evidence, rulings, instructions, exhibits and exceptions do not appear of record, I, the undersigned, the judge who tried said action, and due motion of the signing and settling of the transcript having been waived, do settle and sign this Approval of Transcript to the end that the same may be part of the record herein this 11 day of June, 1968, and I certify that the above and foregoing transcript contains all of the evidence taken, offered, or received on the trial of said action and includes all of the testimony taken, offered, or received on said trial and includes all of the exhibits received on said trial.

F. RYAN DUFFY, JR.  
*Acting Circuit Judge*

**Certificate of Transmittal to Supreme Court**

I, FRANCIS X. McCORMACK Clerk of Circuit Court of said County hereby certify that the attached papers are the original records filed and on record in this office in the above action which are necessary to this appeal or writ of error pursuant to Supreme Court Rule One; this certificate is made for the purpose of transmitting these records to the Supreme Court of Wisconsin.

WITNESS my signature and official seal  
(SEAL) this 3rd day of July 1968

FRANCIS X. McCORMACK  
*Clerk*

By ROSE C. NUGENT  
*Deputy Clerk*

**Notice of Motion**

**STATE OF WISCONSIN  
IN SUPREME COURT**

August Term, 1968

State No. 38

STATE OF WISCONSIN,  
*Respondent,*

v.

JAMES EDMUND GROPPI,  
*Appellant.*

**F I L E D**

Feb. 1, 1968

Franklin W. Clarke  
Clerk, Supreme Court  
Madison, Wisconsin

To:

ROBERT W. WARREN  
*Attorney General*  
State Capitol  
Madison, Wisconsin

E. MICHAEL McCANN  
*District Attorney*  
Milwaukee County  
Milwaukee, Wisconsin

PLEASE TAKE NOTICE that the appellant, James Groppi, shall present the motion, a true copy of which is attached hereto, to the Supreme Court of the State of Wisconsin for a Motion for Rehearing of the above entitled matter which was decided and filed with the Clerk of Supreme Court on the 4th day of February, 1969.

200a

*Notice of Motion*

Dated at Milwaukee, Wisconsin, this 10th day of February, 1969.

THOMAS M. JACOBSON  
110 East Wisconsin Avenue  
Milwaukee, Wisconsin 53202

ROBERT E. SUTTON  
710 North Plankinton Avenue  
Milwaukee, Wisconsin 53203

JACK GREENBERG  
MICHAEL MELTSNER  
HAYWOOD BURNS  
10 Columbus Circle  
New York, New York 10019  
*Attorneys for Appellant*

**Motion for Rehearing**

The appellant above named, James Edmund Groppi, by his attorney, Thomas M. Jacobson, hereby moves that he be granted a rehearing in the above entitled matter.

Dated at Milwaukee, Wisconsin, this 10th day of February, 1969.

THOMAS M. JACOBSON  
110 East Wisconsin Avenue  
Milwaukee, Wisconsin 53202

ROBERT E. SUTTON  
710 North Plankinton Avenue  
Milwaukee, Wisconsin 53203

JACK GREENBERG  
MICHAEL MELTSNER  
HAYWOOD BURNS  
10 Columbus Circle  
New York, New York 10019  
*Attorneys for Appellant*

### Judgment

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Wisconsin, begun and held at the Capitol, in Madison, the seat of government of said State, on the Second Tuesday of August A.D. 1968, on the 67th day of the term, to-wit: On the Fourth day of February A.D. 1969, Present E. Harold Hallows, Chief Justice, Horace W. Wilkie, Bruce F. Beilfuss, Nathan S. Heffernan, Leo B. Hanley, Connor T. Hansen and Robert W. Hansen, Justices of said Court, the following proceedings were had, Inter Alia, to wit:

STATE OF WISCONSIN,

*Respondent,*

v.

Appeal from Circuit Court  
Milwaukee

JAMES EDMUND GROPP, *County, State of Wisconsin*

*Appellant.*

This cause came on to be heard on appeal from the judgment and order of the Circuit Court of Milwaukee County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment and order of the Circuit Court of Milwaukee County, appealed from in this cause, be, and the same are hereby affirmed.

*Chief Justice Hallows concurs.*

*Justices Wilkie and Heffernan dissent.*

STATE OF WISCONSIN,

SUPREME COURT      ss.

*Judgment*

I, FRANKLIN W. CLARKE, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original order and judgment of the Court in the above entitled cause, and that it is a correct transcript therefrom, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court, at Madison, this third day of April, A.D. 1969.

FRANKLIN W. CLARKE  
*Clerk of the Supreme Court  
of the State of Wisconsin*

**Remittitur**

No. 1536

OCTOBER TERM 1968

IN

SUPREME COURT

STATE OF WISCONSIN

State No. 38

August Term, 1968

STATE OF WISCONSIN,

*Respondent,*

v.

JAMES EDMUND GROPPi,

*Appellant.*

INDEX

Argument .....	1
Judgment .....	2
Opinion of the Court .....	3-13
Dissenting Opinion .....	14-24
Concurring Opinion .....	25-26
Denial of Motion for Rehearing .....	27
Notice of Appeal .....	28-29
Admission of Service .....	30-31
Certificate of Clerk .....	32

**Opinion**

On the 1st day of November, A.D. 1968, the same being the 31st day of the August, 1968, Term of said Court, the following proceedings were had in said cause in this Court:

STATE OF WISCONSIN,

*Respondent,*

v.

JAMES EDMUND GROPP,

*Appellant.*

And now at this day came the said parties herein, by their attorneys, and this cause having been argued by Thomas M. Jacobson, Esq. for the said appellant and by Harold B. Jackson, Jr., Assistant District Attorney, for the said respondent, and submitted, and the Court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

And afterwards to-wit on the 4th day of February, A. D., 1969, the same being the 67th day of said term, the judgment of this Court was rendered in words and figures following, that is to say:

*Opinion*

STATE OF WISCONSIN,

*Respondent,*

v.

JAMES EDMUND GROPP,

*Appellant.*

OPINION BY JUSTICE LEO B. HANLEY

This cause came on to be heard on appeal from the judgment and an order of the Circuit Court for Milwaukee County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment and order of the Circuit Court for Milwaukee County be, and the same are hereby, affirmed.

Justices Heffernan and Wilkie dissent. Opinion filed.

Chief Justice Hallows concurs. Opinion filed.

**Opinion**

IN

SUPREME COURT

STATE OF WISCONSIN

State No. 38

August Term—1968

STATE OF WISCONSIN,

*Respondent,*

v.

JAMES EDMUND GROPPi,

*Appellant.*

APPEAL from a judgment and an order of the circuit court for Milwaukee county: F. RYAN DUFFY, JR., County Judge of Milwaukee county, Presiding. *Affirmed.*

This appeal arises from an incident which occurred in the city of Milwaukee, on August 31, 1967. Prior to the time of the incident, and more particularly on August 30, 1967, the mayor of Milwaukee, Henry W. Maier, caused an emergency proclamation to issue which ordered that:

“ . . . marches, parades, demonstrations, or other similar activities are prohibited upon all public highways, sidewalks, streets, alleys, parks and all other public ways and public grounds within the City of Milwaukee between the hours of 4:00 o'clock P.M. and 9:00 o'clock A.M., commencing on this date, Wednesday, August 30, 1967, at 4:00 o'clock P.M. and terminating thirty (30) days thereafter.”

The appellant (hereinafter referred to as the “defendant”) Father James Edmund Groppi, was arrested on

*Opinion*

August 31, 1967, for allegedly violating the proclamation during the course of a civil rights demonstration. In the course of his arrest, defendant was alleged to have resisted the arresting officer. This appeal is concerned solely with the charge of resisting an officer. Any reference to the charge resulting from the violation of the proclamation is purely incidental.

Prior to the commencement of the trial on the "resisting" charge, defendant moved for a change of venue on the grounds of community prejudice. The motion was denied on the ground that sec. 956.03 (3),<sup>1</sup> Stats., provided for a change of venue for community prejudice only in felony matters. Resisting an officer is a misdemeanor.

Also prior to trial a subpoena was executed and served which ordered Henry W. Maier to appear to testify on behalf of the defendant on February 8, 1968. That subpoena was subsequently quashed following a hearing which resulted in the trial court's finding that Mayor Maier could not offer any relevant testimony to the case before the court.

After a trial by jury, the defendant was determined to be guilty of resisting an officer. He was fined \$500 and sentenced to six months in the house of correction. Sentence, however, was stayed, and defendant was placed on two years' probation. The appeal is taken from the judgment of conviction and the order of sentence.

HANLEY, J. The defendant presents the following issues on this appeal:

1. Is sec. 956.03(3), Stats., unconstitutional either on its face or as applied in this case?

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<sup>1</sup> "If a defendant who is charged with a felony files his affidavit that an impartial trial cannot be had in the county, the court may change the venue of the action to any county where an impartial trial can be had. Only one change may be granted under this subsection."

2. May a trial court quash a subpoena which has been properly issued and served upon a witness the defendant desired to call in his defense?

*Unconstitutionality of Sec. 956.03(3), Stats.*

Appellant claims the change of venue statute is unconstitutional on several different grounds: First, that the statute, on its face, is a violation of due process as guaranteed by the Wisconsin and federal constitutions; second, that the face of the statute violates the equal protection clause of the federal constitution. And, finally, it is contended that the statute was unconstitutionally applied in this case. In all cases, the reason for the alleged unconstitutionality is the same, i.e., that the change of venue based on community prejudice is limited to felony cases.

We think that there is a sufficient difference between a felony and a misdemeanor to warrant the distinction.

" . . . In most cases the place of imprisonment is different; the statute of limitations is twice as long for a felony as a misdemeanor; one charged with a felony is entitled to a preliminary hearing; the stigma of a felony is greater; and under the repeater statute, more severe penalties are authorized for felonies than for misdemeanors. . . ." *State ex rel. Gaynon v. Krueger* (1966), 31 Wis. 2d 609, 620, 143 N. W. 2d 437.

Moreover, it would be extremely unusual for a community as a whole to prejudge the guilt of any person charged with a misdemeanor. Ordinarily community prejudice arises when a particularly horrendous crime has been perpetrated. These are the only crimes that receive widespread and prolonged attention from the news media. But the general public just does not become incensed at the commission of a misdemeanor.

*Opinion*

The court also takes judicial notice of the vast number of misdemeanors that are prosecuted as opposed to felonies. As a matter of necessity, the prosecution of misdemeanors has been simplified as much as possible by the legislature. This is not because the legislature is not concerned with justice, but because society demands the efficiency in the administration of justice be given consideration along with absolute fairness.

This court faced a decision similar to the one in this case in deciding whether an indigent accused of a misdemeanor was entitled to the assistance of a court-appointed attorney in his defense. At that time the court stated:

"A basic concern of this court must be to strive for greater fairness in the administration of criminal justice. This contemplates protection of the innocent from wrongful conviction, and a concern for the poor as well as for the affluent. A correlative consideration, nevertheless, must be to protect society from burdens that, if intolerable, might impair the administration of justice. Achieving the proper equilibrium between these important considerations inherently requires that standards be established, thus presenting a situation in which it is difficult to achieve an ideal result." *State ex rel. Plutshack v. Dept. of Health & Social Services* (1968), 37 Wis. 2d 713, 721, 155 N. W. 2d 549, 157 N. W. 2d 567.

The court decided in the *Plutshack* case that counsel should be provided for all indigent defendants who were charged with a crime which was punishable by a maximum sentence of more than six months' imprisonment. This was determined to be a reasonable cutoff point.

*Opinion*

It is also important to recognize that in deciding the *Plutshack* case, the court was not faced with a statute which specifically denied the appointment of counsel to indigents charged with misdemeanors. On the contrary, the applicable statute, sec. 957.26,<sup>2</sup> Stats., had recently been amended<sup>3</sup> so that counsel could be provided in misdemeanor cases. Thus the court was free to adopt the six-month cutoff.

However, in this case, the applicable statute specifies that a change of venue based on community prejudice shall only be permitted in felony cases. Were we free to adopt our own cutoff point, we would establish it at over six months, as we did in reference to the appointment of counsel. However, we are not willing to say that the cutoff point established by the legislature is necessarily arbitrary and capricious.

The court is aware that two other jurisdictions have considered whether a change of venue based on community prejudice can be limited to felony cases.<sup>4</sup> Both decided it could not be without violating the due process clause of the Fourteenth amendment to the federal constitution.

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<sup>2</sup> "957.26 Counsel for indigent defendants charged with felony; advice by court. (1) A person charged with a crime shall, at his initial appearance before a court or magistrate, be advised of his right to counsel and, that in any case where required by the United States or Wisconsin constitution, counsel, unless waived, will be appointed to represent him at county expense if he is financially unable to employ counsel."

<sup>3</sup> Ch. 519, Laws of 1965, amended sec. 957.26(1). Previously that section provided for the appointment of counsel only when a defendant was charged with a felony.

<sup>4</sup> *Pamplin v. Mason* (5th Cir. 1966), 364 Fed. 2d 1; *State ex rel. Ricco v. Biggs* (1953), 198 Ore. 413, 255 Pac. 2d 1055.

*Opinion*

Those cases are not precedent for this court and their reasoning does not compel us to reach the same conclusion.<sup>4a</sup>

The United States Supreme Court held in *Rideau v. Louisiana* (1963), 373 U.S. 723, 83 Sup. Ct. 1417, 10 L. Ed. 2d 663, that a denial of a change of venue, under the circumstances of that case,<sup>5</sup> amounted to a denial of due process. That case is distinguishable on two grounds. First, it involved a felony, as does every other case in the area of change of venue which has been dealt with by the Supreme Court. Second, the defendant put into the record his proof of community prejudice which was at least likely to influence the jury. No record of community prejudice was ever made in this case.

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<sup>4a</sup> The United States Supreme Court recently considered whether a state could constitutionally deny a jury trial to persons accused of a misdemeanor. *Duncan v. Louisiana* (1968), 391 U.S. 145, 88 Sup. Ct. 1444, 20 L. Ed. 2d 491.

The court held that every person had a fundamental right to a jury trial even in state prosecutions if he was charged with a "serious" crime, whereas no such right existed if a person was charged with a "petty" offense. The court refused to draw a distinct line between a petty offense and a serious offense, but the majority did state that any crime punishable by two years' imprisonment, or more, was a serious crime. The court further indicated that, under federal law, a crime involving a maximum sentence of six months, or less, was a petty offense. No opinion was expressed as to the classification of those crimes which involved a maximum sentence of more than six months but less than two years.

In Wisconsin, no misdemeanor is punishable by more than one year of imprisonment.

<sup>5</sup> The circumstances in *Rideau, supra*, were extreme. A twenty-minute film and sound track of the defendant's being "interviewed" by the sheriff was shown over television on three separate occasions. During the course of the interview, the defendant admitted robbery, kidnapping and murder. The Supreme Court decided, without examining the transcript of the *voir dire*, that due process required a trial before a jury drawn from a community of people who had not seen and heard the televised "interview."

*Opinion*

Appellant contends that because his motion for change of venue was denied, he had no opportunity to make a record of the community prejudice. This is simply not true. Both the federal and state constitutions guarantee to every accused the right to a fair and impartial trial.<sup>6</sup> A verdict from a prejudiced jury is void<sup>7</sup> whether or not a change of venue or a continuance was requested.<sup>8</sup> On motions after verdict or on a petition for habeas corpus, a person convicted of either a misdemeanor or a felony can offer proof that he was denied his constitutional right of a fair and impartial trial.<sup>9</sup>

The right to a fair and impartial trial is not synonymous with a change of venue. The only connection between a change of venue and a fair and impartial trial is that the former is one method of insuring the latter. Other methods

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<sup>6</sup> Art. I, sec. 7, Wisconsin Constitution:

"In all criminal prosecutions the accused shall enjoy the right . . . to a speedy public trial by an impartial jury . . ."

Sixth amendment, United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

<sup>7</sup> "Petitioner's detention and sentence of death pursuant to the *void judgment* is in violation of the Constitution of the United States and he is therefore entitled to be freed therefrom. . . ." (Emphasis supplied.) *Irvin v. Dowd* (1961), 366 U.S. 717, 728, 81 Sup. Ct. 1639, 6 L. Ed. 2d 751.

<sup>8</sup> This seems to be the only logical conclusion following the decision in *Sheppard v. Maxwell* (1966), 384 U.S. 333, 86 Sup. Ct. 1507, 16 L. Ed. 2d 600. The verdict of the jury was set aside based on prejudice even though no motion for a change of venue or continuance was made.

<sup>9</sup> The express holding of *Irvin v. Dowd*, *supra*, seems to be that a statute which denies a change of venue is not unconstitutional, either on its face or in its application, so long as the statute is not relied upon to deny a person his right to a fair and impartial trial.

*Opinion*

of insuring a fair trial are voir dire proceedings and continuance.<sup>10</sup>

The defendant here was not denied due process when his change of venue was denied because of the applicable statute. Should a rare case arise where community prejudice threatens to influence the verdict in a misdemeanor case, the defendant can rely on the antiseptic measures of continuance and *voir dire* proceedings. In the event that these measures are still not sufficient to provide an impartial jury, the verdict can be set aside after trial based on the denial of a fair and impartial trial.

If the defendant in the present case feels that he was denied a fair and impartial trial (no such claim has been made to this court), the issue can be raised and evidence can be presented on a motion for a new trial based on a denial of a fair and impartial trial.<sup>11</sup>

*Quashing a Subpoena*

Defendant also contends that it is unconstitutional to deny to a defendant in a criminal action the right to subpoena any witness even if the witness' testimony is admittedly irrelevant.

The Sixth amendment to the United States Constitution and art. I, sec. 7, of the Wisconsin Constitution guarantee

<sup>10</sup> "The remedies in publicity cases are change of venue, continuance, and careful selection of a jury." *State v. Woodington* (1966), 31 Wis. 2d 151, 166, 142 N. W. 2d 810, 143 N. W. 2d 753.

<sup>11</sup> Sec. 958.06(1), Stats., provides:

"Within one year after the trial and on motion of the defendant the court may grant a new trial . . ." (Emphasis supplied.)

The trial in this case ended on February 9, 1968. Some motions after verdict were presented on February 12, 1968, and denied. It does not appear that the presentation of those motions would foreclose the presentation of a motion for a new trial based on an entirely different ground.

*Opinion*

to a defendant in a criminal case the right "to have compulsory process" to obtain witnesses in his behalf. This right is now incorporated in the due process clause of the Fourteenth amendment to the federal constitution and applies equally to the several states.<sup>12</sup> It is also worthy of note that there has been no attempt to limit this right to persons charged with a felony.<sup>13</sup>

In this case, the defendant subpoenaed the mayor of Milwaukee. After the subpoena issued, an assistant city attorney, representing the mayor, moved for an order to show cause why the subpoena should not be quashed. The day before the trial a hearing was held on that order. The attorney for the city argued that the mayor had no personal knowledge of any facts which would be material to the resisting arrest charge against Father Groppi. Counsel for the defendant contended that they hoped to establish by the mayor's testimony either that the proclamation was unconstitutional on its face or that it was unconstitutionally issued. The judge took the motion to quash under consideration until the next day.

The following morning, the defendant withdrew a motion to dismiss the charge based on the unconstitutionality of the proclamation because that issue was pending in the federal court and could best be determined there. The trial court then quashed the subpoena because the issue of the unconstitutionality of the proclamation had been withdrawn. The defendant insisted at that point, and during the trial, that he had a constitutional right to call the mayor.

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<sup>12</sup> *Washington v. Texas* (1967), 388 U.S. 14, 87 Sup. Ct. 1920, 18 L. Ed. 2d 1019.

<sup>13</sup> Sec. 955.04, Stats., provides:

"Any defendant shall have compulsory process to compel the attendance of witnesses in his behalf."

*Opinion*

The defendant has explained in his brief on this appeal why the testimony of the mayor was relevant to this case:

"... had the defendant been able to demonstrate by the testimony of Mayor Maier that the ordinance under which he was initially arrested was illegally promulgated either because of the procedures used or because it was unconstitutional or because it was applied unconstitutionally there can be no question but that the appellant could have legitimately challenged his arrest as illegal and unauthorized. . . ."

We first determine that a defendant does not have an unqualified right to subpoena witnesses. This right is no more absolute than any of the other rights guaranteed by the constitution.

It is readily apparent that a defendant suffers no constitutional deprivation when he is limited to subpoenaing witnesses who can offer relevant and material evidence on his behalf. The proposition is so apparent on its face that it is difficult to find legal citation to support it. However, at least one English case has considered this precise issue. In *King v. Baines* (1909), 1 K.B. 258, the defendants, who were demonstrating for women's suffrage, were arrested for breach of the peace and unlawful assembly. They subpoenaed Prime Minister Herbert Henry Asquith and Home Secretary Herbert John Gladstone to testify at their trial. The subpoenas were subsequently set aside upon proof that neither subpoenaed party could give any relevant testimony at the trial. The setting aside of the subpoenas was upheld on appeal.

We think a subpoena is properly quashed when a party is unable to give relevant evidence.

*Opinion*

We also decide that the testimony which the defendant sought from Mayor Maier was immaterial to the resisting arrest charge. It is not necessary to decide whether that testimony would have been relevant if the constitutionality of the proclamation was in issue. That issue was specifically withdrawn from this case.

In the absence of some showing by the defendant that the witness was necessary for his defense, the quashing of the subpoena is not a violation of a defendant's rights to compulsory process.

We conclude that sec. 956.03(3), Stats., is constitutional and that the trial court's judgment of conviction and order of sentence were proper.

*By the Court.*—Judgment and order affirmed.

### Dissenting Opinion

HEFFERNAN, J. (dissenting) I respectfully dissent from the opinion of the Court insofar as it holds sec. 956.03, Stats., prohibits a change of venue in misdemeanor cases and that such legislative prohibition is constitutional.

To understand what the majority has done, it is necessary to review the facts. It is crystal clear from the record that the defendant moved for a change of venue on the basis of community prejudice. Such prejudice was alleged in the underlying affidavits supporting the motion. The defendant's trial counsel also asked that the court take judicial notice of the "massive coverage by all news media in this community of the activities of this defendant . . . or, in the alternative, that the defendant be permitted to offer proof of the nature and extent thereof, its effect upon this community and on the right of defendant to an impartial jury trial." This motion was denied in its entirety. The reason for such a denial, including the reason for the refusal to hear evidence of prejudice is made clear by the remarks of the trial judge following the denial of the motion.

Counsel asked if the court was denying the motion "because the statute will not permit a change of venue on the grounds of community prejudice . . . ." The court replied, "No, I'm denying the motion . . . because this is a misdemeanor case and not a felony. And the Wisconsin Statute does not provide for a change of venue in a misdemeanor matter."

It is thus apparent that the judge refused to hear evidence on community prejudice because he concluded that the statute gave him no jurisdiction to order a change of venue even if community prejudice were shown.

This, I conclude, is a clear error of law, and the statute as so construed was applied unconstitutionally. The statute

*Dissenting Opinion*

is procedural only. It merely specifies the duty of the judge when prejudice is apparent and the defendant is charged with a felony. It is silent upon the duty of a judge in the event one charged with a misdemeanor asks for a change of venue because of community prejudice. The prohibition that the trial judge found, at least by implication, in the statute is not apparent to this writer.

We have heretofore held, in *State v. Nutley* (1964), 24 Wis. 2d 527, 129 N.W. 2d 155, overruling, sub silentio, *State ex rel. Carpenter v. Backus* (1917), 165 Wis. 179, 161 N.W. 759, to the contrary, that a change of venue for community prejudice is a constitutional right independent of the legislative procedural implementation. In *Nutley*, page 566, we pointed out that the portion of sec. 956.03 (3), Stats., providing, "Only one change may be granted under this subsection," was subject to the due process limitations of the fourteenth amendment to the United States Constitution.

In effect, this court recognized, at least in a felony case, that the power of a court to order a change of venue arose not from the statute but from its inherent power to act to assure a fair trial, and, as required, by the fourteenth amendment.

Are there any reasons why this constitutional assurance of a fair trial by the device of change of venue should be available only to one charged with a felony and not to an alleged misdemeanor?

The majority opinion concludes that it is just and proper to afford fewer constitutional guarantees of fairness to a misdemeanant than to a felon. On the face of it, this proposition runs counter to all principles of Anglo-American jurisprudence; however, factual distinctions, it is contended, make it fair to afford fewer protections to one charged with

*Dissenting Opinion*

a misdemeanor. It is asserted in the opinion of the majority of the Court that the penalties are more severe in the case of felonies. This is, of course, true, but it is a fact entirely irrelevant to the issue. It is, in essence, an assertion that an unfairness that results in only a small sentence is of such a minor consequence as to be *de minimis*. The mere statement of the proposition is its own refutation. Concededly, the legislature has seen fit to confer additional safeguards to defendants accused of major crimes (preliminary hearing, e.g.); however, it is powerless to reduce the minimum safeguards of fairness that are assured by both the Wisconsin and United States Constitutions to all criminal defendants.

The opinion of the court also asserts that community prejudice is not aroused by the commission of a misdemeanor and that, therefore, a change of venue is needless. The simple answer to this proposition is that if there is no community prejudice, it is within the discretion of the trial judge to deny a change of venue. This determination is dependent upon the facts as they subjectively appear and not upon the objective nature of the crime or whether it is labeled a felony or a misdemeanor. The identity of the defendant and his image in the community is also relevant and may be a determining factor in whether or not there is community prejudice, irrespective of the nature or seriousness of the crime charged.<sup>1</sup> To say that the public is not

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<sup>1</sup> The attorney general in his addendum to the district attorney's brief acknowledged that, "Appellant is a controversial figure, but not only in Milwaukee county." While this statement was made by the attorney general to show that a trial in another county might not result in a trial free from prejudice, it is equally probative of the assertion that the defendant could not have received a fair trial anywhere in the state. This, however, is no reason why a change of venue should not have been granted, for under

*Dissenting Opinion*

prejudiced or enraged by the commission of a misdemeanor begs the question. That is precisely what a hearing for a change of venue is intended to determine, and this is what the defendant herein sought to prove. For this Court to decree that prejudice will henceforth not exist in a trial for a misdemeanor is reminiscent of King Canute's edict to hold back the tides.

It is, of course, true that it will be only the unusual and infrequent misdemeanor cases that will become a cause celebre and arouse popular passions. Granting the premise, on which the majority opinion is in part based, that there will be few misdemeanors that will arouse the emotions of the public, how can the rare case so clog the courts with motions for change of venue that the efficient and expeditious disposition of criminal cases will be in jeopardy. The majority opinion's fears are of a bogeyman of court congestion which its own reasoning shows to be without foundation. Moreover, there is no reason why this Court should assume that motions for change of place of trial will be abused or that our courts are so supine as to tolerate such abuse.

While it may be conceded that procedurally it is within the legislature's power to adopt more expeditious methods of handling misdemeanors than felonies, it may not do so if constitutional rights are thereby encroached upon. The legislature may grant the right to a preliminary hearing to a felon, but not to a misdemeanant, but this right is statutory not constitutional. For example, it cannot, under the

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*Nutley, supra*, this court has decided that the defendant is not remediless after one change of venue. If it developed that a fair trial could have been held nowhere in the state, a motion for continuance would then have been appropriate. The first obligation of the trial court was to consider a change of venue so the defendant could be speedily tried.

*Dissenting Opinion*

aegis of greater efficiency in the administration of justice, deny misdemeanants the right to jury trial guaranteed by the Wisconsin Constitution. While efficiency and economy are of great significance in cases where the courts are free to act one way or the other, they have no place in the situation now before us, where this court, as well as the legislature, is answerable to the Constitution.

The recent United States Supreme Court decision, *Duncan v. Louisiana* (May 20, 1968), — U.S. —, pointed out that under the sixth amendment and the fourteenth amendment to the United States Constitution petty offenses could be tried before a judge only. The decision, of course, does not obviate the necessity for a jury trial for misdemeanors in a state like Wisconsin, where a jury trial is available to all defendants. *Duncan*, however, makes it crystal clear that a trial, before whomsoever held, must be fair. Justice Harlan, although dissenting in *Duncan* and agreeing that a state by its own constitution should be able to determine the necessity of a jury trial, stated there were nevertheless certain prerequisites to a system of ordered liberty, one of them being a fair trial. He said, "I should suppose it obviously fundamental to fairness that a 'jury' means an 'impartial jury.'" (P. 181, 182, slip sheet).

In the instant case, a jury is guaranteed by the Wisconsin Constitution, and *Duncan* makes it clear that a jury must be impartial. A litigant is constitutionally entitled to invoke the device of change of venue to determine whether or not a trial may be had free from the contamination of community prejudice. Where the trial of a misdemeanant is before a judge, under Wisconsin law he may file an affidavit of prejudice if he thinks it necessary to assure a fair trial. He should not have a lesser right to a fair and impartial

*Dissenting Opinion*

trial if he invokes his constitutional prerogative of trial by jury.

Nor is *State ex rel. Plutshack v. Department of Health and Social Services* (1968), 37 Wis. 2d 713, 155 N.W. 2d 549, 157 N.W. 2d 567, relevant to this case. Contrary to the assertion of the majority opinion, this court, therein, was not influenced or controlled by sec. 957.26, Stats. It was controlled by the rulings of the United States Supreme Court which have been interpreted to mean that there shall be counsel whenever a "substantial sentence" may be imposed. The opinion of the Court in *Plutshack* was influenced by legislation only to the extent that we concluded that congressional legislation (Criminal Justice Act of 1964) was declaratory of constitutional requirements.

In the instant case we have elevated the legislature's enactment of sec. 956.03, Stats., to the status of a limitation on the constitutional rights of citizens accused of crime. To do so is, I believe, a misinterpretation of a statute the legislature intended to be procedural only and constitutes an abdication of a constitutional responsibility of this Court.

We are herein in no way bound or guided, as we said we were in *Plutshack*, by legislation that appears to us to be declaratory of a proper constitutional standard already found by the Supreme Court of the United States. In the instant case what the legislature had to say about change of venue in felony cases is irrelevant to a constitutional right of an alleged misdemeanant.

This writer is of the opinion that the trial court and the majority of this Court interpreted the statute in such a way as to deprive misdemeanants of important constitutional rights. In *State ex rel. Ricco v. Biggs* (1953), 198 Or. 413, 255 Pac. 2d 1055, the Oregon Supreme Court,

*Dissenting Opinion*

faced with a similar statute, pointed out that such an interpretation violated the Oregon constitutional guaranty of a fair trial (similar to Wisconsin's), as well as the due process clause of the fourteenth amendment. That court pointed out, as does this dissent, that the legislative enactment does not govern whether a misdemeanor is entitled to a change of venue, for the right to a changed place of trial depends not upon legislative consent but upon the constitutional right of fair trial.

It is the opinion of this writer that the inherent power of a court to order a change of venue for community prejudice is beyond question.

This writer would also conclude that in any criminal case a court of justice has the inherent duty, where the question is raised, to inquire into the matter of community prejudice and to hold a hearing in order to exercise its discretion in respect thereto. This duty is constitutional, not statutory, and in proper circumstances should be exercised *sua sponte*.

Nor can I agree with the majority opinion's conclusion that even though a change of venue could or should have been granted, a fair trial is still assured by the procedures of the *voir dire* and motions after verdict.

This is hardly an argument for efficient judicial administration for if an atmosphere of prejudice or unfairness can be detected prior to trial, it is folly to spend the public's money on a trial that will be set aside.

No doubt, motions after verdict are useful safety devices to correct error that perhaps has already occurred, but the goal of the proper administration of justice is the avoidance of error. The device of change of venue seeks the avoidance of error.

Moreover, the test of community prejudice is not whether an impartial jury can or cannot be impaneled but whether

*Dissenting Opinion*

there is a "reasonable likelihood" that community prejudice exists. *Sheppard v. Maxwell* (1966), 384 U.S. 333, 86 S. Ct. 1245, 16 L. Ed. 2d 314.

The American Bar Association Advisory Committee on Fair Trial and Free Press at pages 126, 127, and 128 discussed the efficacy of the *voir dire* as a guaranty of a fair trial:

"It has in many jurisdictions been common practice for denial of such a motion to be sustained if a jury meeting prevailing standards could be obtained. There are two principal difficulties with this approach. First, many existing standards of acceptability tolerate considerable knowledge of the case and even an opinion on the merits on the part of the prospective juror. And even under a more restrictive standard, there will remain the problem of obtaining accurate answers on *voir dire*—is the juror consciously or subconsciously harboring prejudice against the accused resulting from widespread news coverage in the community? Thus if change of venue and continuance are to be of value, they should not turn on the results of the *voir dire*; rather they should constitute independent remedies designed to assure fair trial when news coverage has raised substantial doubts about the effectiveness of the *voir dire* standing alone.

"The second difficulty is that when disposition of a motion for change of venue or continuance turns on the results of the *voir dire*, defense counsel may be placed in an extremely difficult position. Knowing conditions in the community, he may be more inclined to accept a particular juror, even one who has expressed an opinion, than to take his chances with other, less desirable jurors who may be waiting in the wings.

*Dissenting Opinion*

And yet to make an adequate record for appellate review, he must object as much as possible, and use up his peremptory challenges as well. This dilemma seems both unnecessary and undesirable. . . .

"The suggestion of some courts that . . . [failure to exhaust all peremptory challenges] amounts to a waiver [of a right to transfer or continuance] seems to require the defendant to take unnecessary risks. If the defendant has satisfied the criterion for the granting of relief, it should not matter that he . . . has failed to use his peremptory challenges, perhaps because he prefers the ills he has to others he has not yet seen."

In *State v. Nutley, supra*, pages 565, 566, this Court accepted the conclusion that a *voir dire* does not necessarily assure a trial free from the contamination of community prejudice:

"The United States supreme court has held that even if a defendant has examined prospective jurors at length during a *voir dire*, and even if the jurors state that they will evaluate the issues only on the evidence presented during the trial, a defendant may still be denied a fair trial if prejudicial pretrial publicity is of such quantitative and qualitative magnitude that it is probable that the jurors predetermined the issue despite their protestations to the contrary. This rule of Fourteenth amendment due process is applicable even though the defendant may have received one change of venue, pursuant to a state statute similar to sec. 956.03, Stats."

True, this court has in numerous cases looked to the *voir dire* to determine that a trial was free from the taint

*Dissenting Opinion*

of prejudice. This technique, while efficacious in some cases, is directed primarily to the question of whether a trial judge abused his *discretion* in determining that the prejudice alleged or proved was not of such a nature as to prevent a fair trial. Here, abuse of discretion is not in question. The trial judge here relied upon his interpretation of a statute and concluded that he was precluded by law from granting a change of venue. Discretion was not exercised. Hence, the error was one of law and the usual *voir dire* cases are not directed to the issue raised herein.

*Mason v. Pamplin* (1964), 232 F. Supp. 539, 540, 541, 542, 543 (*Affm'd Pamplin v. Mason* (1966), 364 F. 2d 1), a case involving the right of a change of venue in a misdemeanor case where the Texas statute referred only to felonies, stated:

"The record reflects that the prospective jurors, who apparently qualified as a group, stated that they did not know petitioner; that they had not formed any opinions in the case; and that they had no prejudices against the Negro race, or against a Negro acting as counsel for petitioner. No testimony on this question, other than the sworn statement of petitioner's counsel, was offered at the hearing on the motion for new trial. . . .

"Whatever doubt may have existed prior to 1960 with respect to the inherent right of an individual to a change of venue if he demands a jury trial, and it is made to appear that in the county where the prosecution is begun an impartial jury cannot be impaneled, was dispelled by the Supreme Court in *Irvin v. Dowd*, 366 U.S. 717 . . . , when it recognized the proposition that a transfer may become a *necessity*, depending upon 'the totality of the surrounding facts.' Such

*Dissenting Opinion*

'totality' cannot be achieved if the court is precluded by law from hearing any competent evidence which may be offered before, during or after trial for the purpose of showing one's inability to obtain a fair and impartial trial in a particular county. . . .

"The hearing on the change of venue is the first and most important step in ascertaining whether or not the accused can receive a fair and impartial trial in the county in which the prosecution is pending. The void which is left when the initial hearing is dispensed with could hardly be filled in a misdemeanor case, any more than it could in a felony case, by the subsequent voir dire examination of prospective jurors in a group, or by producing at a hearing on a motion for new trial testimony the Court has previously refused to hear. . . .

"If the allegations made by [petitioner] had been found to be true [at a venue hearing], he would have been entitled to a change of venue, irrespective of the fact that the jurors themselves as a group indicated that they had no prejudices. As the Supreme Court said in Dowd: 'No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father.' 366 U.S. 717. . . ."

The denial of the defendant's motion, which in the alternative asked for a hearing on community prejudice, denied the defendant (contrary to the assertion of the majority opinion) an opportunity "to make a record of community prejudice." This is true because the judge made it clear that in the case of a misdemeanor, community prejudice was irrelevant to a change of venue—there was just no

*Dissenting Opinion*

statutory authority for such change. In motions after verdict defendant asked for a new trial on the ground, among others, that the court erred in denying the motion for change of venue on the assumption that the statute applied only to felony cases. This motion was again denied. The defendant also asked for a new trial on the ground that the one accorded him was unfair.

The defendant's motion was denied without hearing or explanation. It is apparent that the trial judge, relying on his interpretation of the law, refused to look to the alleged facts of community prejudice, and afforded the defendant no opportunity to make a record.

I would reverse the judgment of the circuit court and order a new trial, directing the trial court that, in the event a motion for change of venue is made, to exercise its discretion to determine whether or not the facts adduced at hearing warrant the granting of a change of venue.

I am authorized to state that Mr. Justice Wilkie joins in this dissent.

### Concurring Opinion

HALLOWS, C. J. (concurring) I concur in the result only of the majority opinion because I believe with the minority that an accused has a constitutional right to a fair trial in misdemeanor cases and to attain that end may have a change of venue if he shows community prejudice. The minority opinion well states the view that sec. 956.03(3), Stats., is regulatory only of this basic right to a fair trial and is not exclusive by implication. The right to a change of venue to secure a fair trial is consistent with my belief that an accused has a constitutional right to an attorney in all misdemeanor cases, which was expressed in *Sparkman v. State* (1965), 27 Wis. 2d 92, 102, 133 N.W. 2d 776, and again in the dissent in *State ex rel. Plutshack v. H&SS Department* (1968), 37 Wis. 2d 713, 727, 155 N.W. 2d 549, 157 N.W. 2d 567.

I differ with the minority in its remedy in this case. To these facts I would apply the harmless-error rule as stated in *Whitty v. State* (1967), 34 Wis. 2d 278, 149 N.W. 2d 557, cert. denied 390 U.S. 959. Not every violation of a constitutional right requires a reversal or a new trial. Prejudice resulting from error or the denial of a constitutional right must be shown. In the instant case, the defendant had no difficulty in selecting and obtaining a satisfactory jury and one which on the record he does not claim was biased or unfair.

The exercise of the constitutional right to a change of venue on the ground of community prejudice is a means to secure an unprejudiced and fair jury so that a fair trial may be assured. If such a saturation of prejudice exists in a community from which the jury is drawn so as to make it difficult to select and obtain an impartial jury, then it is better to change the venue of the case than to

*Concurring Opinion*

waste time attempting to find an unprejudiced jury. But a juror's knowledge of events is to be distinguished from prejudice or predetermined opinion. One may have knowledge without prejudice. The members of a jury may be informed without the jury being prejudiced. I think also that community prejudice has little or no effect on a witness. The argument that a witness will testify differently in one county than he will in another is unconvincing. No matter where the witness testifies, he must live in the community from which he comes.

On the facts of this case, I see no reason for a reversal.

**Order Denying Motion for Rehearing**

And afterwards to-wit on the 1st day of April, A.D., 1969, the same being the 87th day of said term, the following proceedings were had in said cause in this Court:

STATE OF WISCONSIN,

*Respondent,*

v.

JAMES EDMUND GROPP, JR.,

*Appellant.*

The Court being now sufficiently advised of and concerning the motion of the said appellant for a rehearing in this cause, it is now here ordered that said motion be, and the same is hereby, denied without costs.

**Notice of Appeal  
to the Supreme Court of the United States**

**STATE OF WISCONSIN**

**IN SUPREME COURT**

August Term, 1968

State No. 38

**STATE OF WISCONSIN,**

*Respondent,*

**v.**

**JAMES EDMUND GROPPi,**

*Appellant.*

Notice is hereby given that James Edmund Groppi, the appellant above-named hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Wisconsin entered on February 4, 1969 affirming a judgment of conviction against appellant, rehearing of which was denied on April 1, 1969.

The appeal is taken pursuant to 28 U.S.C. Section 1257 (2).

Appellant was convicted of the crime of resisting an officer and was fined \$500.00 and sentenced to six months in the House of Correction which was stayed and defendant placed on two years probation.

The Clerk will please prepare a transcript of the record in this cause and transmission to the Clerk of the Supreme Court of the United States and include in said transcript the entire record before the Supreme Court of Wisconsin.

The following question is presented by this appeal: Whether Section 956.03(3) Wisconsin Statutes violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

**THOMAS M. JACOBSON**

**Attorney for Appellant**

**Certification**

I, Franklin W. Clarke, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that the foregoing are true and complete copies of the proceedings before this Court No. 38, August Term, 1968, and of the opinion of this Court in said cause, and constitute all of the record remaining in my custody, the balance of the record referred to in the attached notice of appeal having been remitted to the Circuit Court for Milwaukee County, on the 3rd day of April, 1969.

[SEAL]

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Madison, Wisconsin, this 14th day of May, 1969.

FRANKLIN W. CLARKE  
Clerk of Supreme Court, Wisconsin

**Supreme Court of the United States**

**No. 250 ----- , October Term, 19 69**

**James Edmund Groppi,**

**Appellant,**

**v.**

**Wisconsin**

**APPEAL from the Supreme Court of the State  
of Wisconsin.**

**The statement of jurisdiction in this case  
having been submitted and considered by the Court,  
probable jurisdiction is noted and the case is placed  
on the summary calendar.**

**June 15, 1970**

**Mr. Justice Marshall took no part in the consideration  
or decision of this matter.**

FILE COPY

FILED

JUN 17 1969

JOHN F. DAVIS, CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1968

No. ~~1530~~ ~~950~~ 26

JAMES EDMUND GROPP, JR.,

*Appellant,*

—VS.—

STATE OF WISCONSIN,

*Respondent.*

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

**JURISDICTIONAL STATEMENT**

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## TABLE OF CONTENTS

	PAGE
Opinion Below .....	1
Jurisdiction .....	1
Constitutional and Statutory Provisions Involved .....	2
Question Presented .....	2
Statement .....	3
1. Events Prior to Appellant's Charge for Re-	
sisting Arrest .....	3
2. The Resisting Arrest Charge .....	5
3. Proceedings in Trial Court .....	7
How the Federal Questions Were Raised and De-	
cided Below .....	10
The Federal Questions Are Substantial .....	13
I. W.S.A. §956.03(3) Denies Appellant's Four-	
teenth Amendment Right to a Fair Trial by	
Totally Prohibiting a Change of Venue in a	
Serious Criminal Prosecution Regardless of the	
Extent of Community Prejudice .....	14
II. For Purposes of Change of Venue There Is No	
Rational Basis for a Distinction Between Per-	
sons Charged With a Felony and Persons	
Charged With a Misdemeanor .....	23
CONCLUSION .....	26
APPENDIX	
Opinion of the Supreme Court of Wisconsin .....	1a

## TABLE OF CASES

	PAGE
Baxstrom v. Herold, 383 U.S. 107 (1966) .....	23
Beck v. Winters, 407 F.2d 125 (8th Cir. 1969) .....	17, 25
Duncan v. Louisiana, 391 U.S. 145 (1968) ....	14, 15, 16, 17, 25
Edwards v. South Carolina, 372 U.S. 229 (1963) .....	19
Gideon v. Wainright, 372 U.S. 335 (1963) .....	17
Gregory v. Chicago, — U.S. —, 22 L.ed. 2d 134, 89 S. Ct. — (1969) .....	19
Gulf, Colorado and Santa Fe Ry. v. Ellis, 165 U.S. 150 (1897) .....	23
Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965) ....	25
In Re Murchison, 349 U.S. 133 (1955) .....	14
Irvin v. Dowd, 366 U.S. 717 (1961) .....	14, 19, 20
James v. Headley, — F.2d — (5th Cir. 1969) .....	25
Kurtz v. Moffitt, 115 U.S. 487 (1885) .....	24
Mason v. Pamplin, 232 F. Supp. 539 (Tex. 1964) af- firmed sub nom. Pamplin v. Mason (5th Cir. 1966), 364 F.2d 1 .....	21
Parker v. Gladden, 385 U.S. 363 (1966) .....	14
People v. Causley, 399 Mich. 340, 300 N.W. 111 (1941)	24
Pointer v. Texas, 380 U.S. 400 (1965) .....	14
Rideau v. Louisiana, 373 U.S. 723 (1963) .....	14, 20
Sheppard v. Maxwell, 384 U.S. 333 (1966) .....	14, 23

Shuttlesworth v. Birmingham, 373 U.S. 262 (1963), 376 U.S. 339 (1964); 382 U.S. 87 (1965); — U.S. —, 22 L.ed. 2d 162, 89 S. Ct. — (1969) .....	19
Sibron v. New York, 392 U.S. 40 (1968) .....	2
Skinner v. Oklahoma, 316 U.S. 536 (1942) .....	23
State ex rel. Gaynon v. Krueger, 31 Wis.2d 609, 143 N.W. 2d 437 (1966) .....	15
State ex rel. Plutshak v. State Dept. of Health and Social Services, 37 Wis.2d 713, 155 N.W.2d 567 (1968) .....	17
State ex rel. Rico v. Biggs, 198 Ore. 143, 255 Pac.2d 1055 (1953) .....	22
State v. Nutley, 24 Wis.2d 527, 129 N.W.2d 155 (1964) .....	15
Thompson v. Louisville, 362 U.S. 199 (1960) .....	21
Turner v. Louisiana, 379 U.S. 466 (1965) .....	14
Washington v. Texas, 388 U.S. 14 (1967) .....	14

TABLE OF  
CONSTITUTIONAL AND STATUTORY PROVISIONS

W.S.A. Constitution Art. 1, §7 .....	15
W.S.A. §939.60 (1967) .....	13, 24
W.S.A. §946.41 .....	3
W.S.A. §956.03(3) .....	1, 2, 8, 9, 10, 11, 13, 14, 15, 17, 18, 19, 20, 21, 24
28 U.S.C. §1257(2) .....	1
28 U.S.C. §2103 .....	2

## OTHER AUTHORITIES

	PAGE
Standards Relating to Fair Trial and Free Press, (A.B.A. Project on Minimum Standards for Criminal Justice, 1966) .....	20, 23
Goebel, Felony and Misdemeanor (1937) .....	24
Constitutional and Sattutory Provisions Involved .....	2
phrase "all criminal prosecutions" applies not only to	

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1968

No. ....

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JAMES EDMUND GROPP, I,

*Appellant,*

—VS.—

STATE OF WISCONSIN,

*Respondent.*

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ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

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**JURISDICTIONAL STATEMENT**

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**Opinion Below**

The opinion of the Supreme Court of Wisconsin is reported at 41 Wis.2d 312, 164 N.W. 2d 266 (1969) and is set forth in the Appendix, *infra* pp. 1a-24a.

**Jurisdiction**

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2), this being an appeal which draws into question the validity of W.S.A. §956.03(3) *infra*, p. 2, on the ground that it is repugnant to the Constitution of the United States.

Appellant was convicted of resisting arrest in the Circuit Court of Milwaukee County. A change of venue and motion to dismiss were denied on the ground that W.S.A. §956.03(3) did not permit a change of venue in a misde-

meanor case. On appeal, his conviction and sentence were affirmed on February 4, 1969. On April 1, 1969 a petition for rehearing was denied. Timely notice of appeal to this Court was filed in the Supreme Court of Wisconsin on May 6, 1969. As the Supreme Court of Wisconsin explicitly rejected appellant's challenge to W.S.A. §956.03(3), this matter is appropriately brought to this Court by appeal. See e.g. *Sibron v. New York*, 392 U.S. 40 (1968).

In the event that the Court does not consider appeal the proper mode of review, appellant requests that the papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. §2103.

### **Constitutional and Statutory Provisions Involved**

This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States.

This case also involves §956.03(3) of Wisconsin Statutes, which states:

If a defendant who is charged with a felony files his affidavit that an impartial trial cannot be had in the county, the court may change the venue of the action to any county where an impartial trial can be had. Only one change may be granted under this subsection.

### **Question Presented**

Whether W.S.A. §956.03(3), which prohibits Wisconsin trial courts from granting a change of venue when an impartial trial cannot be had because of community prejudice in a misdemeanor case, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment?

### Statement

Appellant James E. Groppi, a Roman Catholic priest, was charged with resisting arrest under W.S.A. §946.41, a misdemeanor punishable by a maximum of one year imprisonment in a county jail and a five hundred dollar fine, as a result of an incident arising out of a civil rights march in Milwaukee, Wisconsin on August 31, 1967 (R. 22, 90, 92).<sup>1</sup> Father Groppi was convicted by a jury of resisting arrest on February 9, 1968 (R. 175) and sentenced to six months in prison and a fine of five hundred dollars. The six month sentence was stayed and appellant was placed on two years probation (R. 185). If the five-hundred dollar fine were not paid within twenty-four hours, appellant was to serve an additional six months in prison.

On February 4, 1969, the Supreme Court of Wisconsin affirmed appellant's conviction and sentence. Chief Judge Hallows, concurred, and Judges Heffernan and Wilkie dissented. A petition for rehearing was denied on April 1, 1969.

#### 1. Events Prior to Appellant's Charge for Resisting Arrest.

Prior to and during the incidents that led to his arrest, appellant was advisor to the Youth Council of the Milwaukee Chapter of the National Association for the Ad-

<sup>1</sup> Specifically, appellant was charged with:

Unlawfully, knowingly resist[ing] Wilfred Buchanan, duly appointed and qualified, and acting police officer of the City of Milwaukee, in said county, while the said Wilfred Buchanan was then and there engaged in doing an act in his official capacity, and with lawful authority, to wit: . . . while said defendant was being carried to a police wagon, after being placed under arrest, said defendant began kicking his legs, striking said officer, Wilfred Buchanan in the body with his foot, that said defendant [swore at Wilfred Buchanan] (R. 20)

vancement of Colored People (hereinafter NAACP), a group active in the Milwaukee area in support of efforts of Negro citizens to obtain equal civil rights.

On August 30, 1967, the Mayor of Milwaukee issued a proclamation prohibiting all "marches, parades, demonstrations, or other similar activities" in Milwaukee between the hours of 4 P.M. and 9 A.M. for a thirty-day period (R. 55). The proclamation was the Mayor's response to several civil rights demonstrations and marches in the Milwaukee area "for a fair housing bill, to consider the right of movemnet within the confines of our country . . ." (R. 93).

On August 31, 1967, Father Groppi along with "an assembly of black and white people from the community met at St. Boniface's Church [located at the corner of North 11th and West Meinecke] to discuss the Mayor's Proclamation, the demonstrations, and the arrest of Youth Council members and the people of the community on the previous night" (R. 93). Between 7 P.M. and 8 P.M. three to four hundred persons from that assembly decided to march from the church to City Hall in order to "question the Mayor on the Proclamation" (R. 95). They marched very slowly in a peaceful and orderly fashion (R. 36), three or four abreast, arms locked, south on North Eleventh Street (R. 22, 30, 36, 90). Father Groppi was one of those at the head of the march (R. 103). The group turned east on West North Avenue, and continued marching (R. 30, 36).

While the group was still on North Eleventh Street, prior to marching down West North Avenue, Inspector Ullius of the Milwaukee Police Department announced that the march was in violation of the Mayor's proclamation (R. 31). Although Ullius used a bullhorn and repeated a

demand that the marchers disperse, he testified that because of the "singing and booing," he did not know how many marchers actually heard the warning (R. 31, 35). Appellant himself testified that he did not recall hearing any warning, although he did not deny that in fact it might have been given (R. 91, 103).

When the march continued Inspector Ullius ordered "police action to stop the march" (R. 32, 36). Patrolman Armando Brazzoni, who had been walking alongside Father Groppi, immediately arrested the appellant (R. 37, 49). "grabb[ing]" him "around the right shoulder and collar" (R. 56). There is no contention that Father Groppi offered any resistance. Patrolman Brazzoni and a Sergeant Miller took Father Groppi to a waiting paddy wagon (R. 41, 57). After walking some twenty or thirty yards with the officers, and as he approached the paddy wagon (R. 105) Father Groppi "became limp in body and sat in the street" (R. 41, 57, 91). Father Groppi's "going limp" was not contested (R. 106)<sup>2</sup> nor was it a basis for the resisting arrest charge (R. 165, 167).

## 2. The Resisting Arrest Charge.

Events subsequent to Father Groppi's "going limp" formed the basis of the charge of resisting arrest (R. 165, 167). The police and appellant's version of these events were in sharp conflict. The State called as witnesses the three police officers who "carried" Father Groppi from his "limp" position on the street to the paddy wagon (R. 41, 56, 73). Defense counsel called Father Groppi (R. 91), two newspaper reporters (R. 133, 138), and three marchers

<sup>2</sup> When asked why he went limp, Father Groppi responded, "I was arrested a number of times in Civil Rights demonstrations, going limp, does not constitute resisting arrest and I went limp" (R. 106).

(R. 116, 141, 151), all of whom were near Father Groppi when the alleged resistance occurred (R. 95, 134, 138, 121, 144, 155).

Patrolman Brazzoni, testified that after giving his shotgun to another officer (R. 57) he picked Father Groppi up from his limp position by the "upper part of the body, by the shoulders" (R. 42). At the same time Sergeant Miller picked up his right leg and Officer Buchanan his left leg (R. 42). Buchanan had his night stick in a hand that was around Groppi's leg (R. 75, 78, 79). The officers then carried Father Groppi to the paddy wagon (R. 42, 57, 75). Sergeant Miller testified that as they neared the wagon "Father Groppi suddenly became violent . . . He kicked out with his left leg at Officer Buchanan, catching him in the chest and he [appellant] hollered out, 'let go of my leg you——.'" (R. 44). Officer Brazzoni testified similarly but added that Father Groppi was kicking his feet "in a motion, like pedaling a bicycle" during the entire time he was being carried (R. 58-60). When they arrived at the wagon, Father Groppi's "body jerked." "I don't know what caused the jerk" (R. 60). He stated that as Father Groppi jerked he said, "I want that man's badge number" (referring to Officer Buchanan) (R. 62). Buchanan's testimony did not materially differ from Brazzoni's. He stated that Father Groppi's jerk or kick landed on Buchanan's chest, pushing him to one knee (R. 76).

Father Groppi denied the officer's version of the facts. While being carried to the wagon "My foot began to hurt . . . as if someone were digging their fingernails into my foot . . . (R. 96). The gouging continued and as he arrived near the wagon he said to officer Brazzoni: "he is gouging his fingers into my foot," and asked, "what is that officer's [Buchanan's] badge number . . . I noticed he wasn't wearing a badge. . . ." Officer Brazzoni said "that is for you

to find out." (R. 97).<sup>3</sup> Groppi conceded that he "did react to the pressure placed on his leg" but only by attempting to wiggle his foot free of the gouging. He flatly denied, however, that he had "kick[ed] the officer in the chest." (R. 98-99)

A reporter for the Milwaukee *Journal*, who was approximately 15 to 20 feet from the paddy wagon, testified that "at no time when I was in the vicinity, did I hear him use any profanity". (R. 133-134) The Chief photographer from WISN T.V., who was also standing fifteen feet from the paddy wagon, stated that he did not see Father Groppi kick a police officer or hear him use profanity (R. 138).

Three other defense witnesses all of whom were arrested as marchers, testified that they saw no kicking and heard no profanity. On the contrary, they stated that Father Groppi was complaining about the "gouging of his foot while being carried" (R. 120-21, 144-147, 155). Prentice McKinney said he heard Father Groppi "telling the other officer to make this—this other officer quit gouging his leg" (R. 144). Mike Cullen testified that appellant called out "my leg, my leg" as he was carried to the paddy wagon. Terry Astuto heard appellant say that an officer was "gouging out my foot" (R. 122).

### 3. Proceedings in Trial Court.

On September 26, 1967 appellant moved for a change of venue from the Circuit Court of Milwaukee County. The motion stated, *inter alia*, that the defendant "requests that [the] Court take judicial notice of the massive coverage by all news media . . . or in the alternative that the defendant be permitted to offer proof of the nature and extent

<sup>3</sup> Officer Buchanan was asked on cross-examination why he didn't wear a badge on the night of August 31. He responded that he was "under orders from the Department" not to wear one and he further stated, "I don't question my superiors." (R. 77)

thereof . . ." In an affidavit he alleged that he had received massive and frequently adverse news coverage and publicity, as well as critical editorials, by all of the news media in Milwaukee County. The motion was denied by the trial judge "because this is a misdemeanor case and not a felony. And the Wisconsin statute does not provide for a change of venue in a misdemeanor matter." (Ruling on Motion for Change of Venue, October 2, 1967). On December 11, 1967, appellant entered a plea of not guilty, but soon after his trial began a juror became ill and a mistrial was declared. The case was continued to February 8, 1968.

On January 10, 1968, appellant filed a motion to dismiss on the grounds that the Wisconsin statute which provided for a change of venue, W.S.A. §956.03(3), was unconstitutional because it prohibited a change of venue in misdemeanor prosecutions.<sup>4</sup> Appellant also moved to dismiss the resisting arrest charge on the ground that the Mayor's proclamation prohibiting all demonstrations in the City of Milwaukee was unconstitutional (R. 14), but this motion was subsequently withdrawn on the ground that the question was pending before a federal court (R. 14).

On February 8, 1968, the Circuit Court of Milwaukee County denied the "motion to dismiss on the grounds of §956.03(3) that it is unconstitutional" (R. 18). Subsequently, this colloquy took place:

Mr. Jacobson [Defense Counsel]: On that last motion Your Honor, to make sure for the record, they had a—

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<sup>4</sup> Section 956.03(3) states:

If a defendant who is charged with a felony files his affidavit that an impartial trial cannot be held in the county, the court may change the venue of the action to any county where an impartial trial can be had. Only one change may be granted under this subsection.

The Court: The prior—[referring to prior hearing on Oct. 2]

Mr. Jacobson: The basis for this particular motion the Court denied a change of venue, because of community prejudice, and the rationale of the Court was that the statute only provided a change of venue to community [sic] felonies, and not in misdemeanors.

The Court: That's right.

Mr. Jacobson: Therefore at this time the defendant's counsel on behalf of the Defendant, has challenged the constitutionality of the change of venue, to community prejudice statute [sic], on the basis that it is a denial of equal protection to criminals, or alleged criminals, on a basis of a serious line of demarcation, of one year, that is what separates a misdemeanor from a felony. However, we have an infraction of fundamental rights at issue and that, that statute has really no foundation, so we are attacking it on that basis, of equal protection.

The Court: My motion to dismiss is on the grounds that it is a matter for the legislature, and not the Courts, so the motion to dismiss on the change of venue, on the grounds that section is unconstitutional, because it provides for a change of venue, is denied. Now, that we have all these motions disposed of, we will proceed on this case, on its merits, and we will proceed to select a jury (R. 17-19).

After verdict of guilty was returned by the jury on February 9, 1968, appellant made a motion for an order setting aside the jury verdict in part on the grounds that "the trial court erred in denying defendant's motion for a change of venue on the ground of community prejudice. . ."; "... that the change of venue statute, §956.03(3) is unconstitu-

tional that it denies to a defendant who is charged with a misdemeanor offense a fair trial as required by the Fourteenth Amendment of the United States Constitution." (R. 57-59). The circuit court denied the motion.

### **How the Federal Questions Were Raised and Decided Below**

Prior to trial, appellant moved for a change of venue and to dismiss the complaint on the ground that W.S.A. §956.03(3), which purports to limit a change of venue to felony cases, violated the Fourteenth Amendment. Both motions were denied, the trial court at one point stating that:

"... (T)he change of venue asked for in the motion for a change of venue will be denied; it is not being provided for in the Wisconsin Statutes ... I'm denying the motion for a change of venue because this is a misdemeanor case and not a felony. And the Wisconsin Statute does not provide for a change of venue in a misdemeanor matter ... Not in a misdemeanor matter; a felony only." (R. 10, 11)

See also the colloquy set forth at pp. 8, 9 *supra*. A motion for a verdict of acquittal notwithstanding the verdict or, alternatively, for a new trial, based, *inter alia*, upon the alleged unconstitutionality of W.S.A. §956.03(3) under the Due Process and Equal Protection Clauses of the Fourteenth Amendment was denied (R. 57-59).

On appeal, the Supreme Court of Wisconsin stated the question before it as follows:

Is sec. 956.03(3), Stats., unconstitutional either on its face or as applied in this case? (*infra*, p. 2a)

The court then stated appellant's contentions concerning the statute as it understood them:

Appellant claims the change of venue statute is unconstitutional on several different grounds: First, that the statute, on its face, is a violation of due process as guaranteed by the Wisconsin and federal constitutions; second, that the face of the statute violates the equal protection clause of the federal constitution. And, finally, it is contended that the statute was unconstitutionally applied in this case. In all cases, the reason for the alleged unconstitutionality is the same, i.e., that the change of venue based on community prejudice is limited to felony cases. (*infra*, p. 3a)

The majority opinion of Supreme Court squarely rejected appellant's contention:

We think that there is a sufficient difference between a felony and a misdemeanor to warrant the distinction . . . Moreover, it would be extremely unusual for a community as a whole to prejudice the guilt of any person charged with a misdemeanor. Ordinarily community prejudice arises when a particularly horrendous crime has been perpetrated. These are the only crimes that receive widespread and prolonged attention from the news media. But the general public just does not become incensed at the commission of a misdemeanor.

The court also takes judicial notice of the vast number of misdemeanors that are prosecuted as opposed to felonies. As a matter of necessity, the prosecution of misdemeanors has been simplified as much as possible by the legislature. This is not because the legis-

lature is not concerned with justice, but because society demands that efficiency in the administration of justice be given consideration along with absolute fairness. (*infra*, pp. 3a, 4a).

Chief Judge Hallows concurred. He agreed with the dissenting Judges that "an accused has a constitutional right to a fair trial in misdemeanor cases and to attain that end may have a change of venue if he shows community prejudice" but concluded that appellant had not been sufficiently prejudiced to require reversal (*infra*, p. 11a).

Judges Heffernan and Wilkie dissented:

The majority opinion concludes that it is just and proper to afford fewer constitutional guarantees of fairness to a misdemeanant than to a felon. On the face of it, this proposition runs counter to all principles of Anglo-American jurisprudence; however, factual distinctions, it is contended, make it fair to afford fewer protections to one charged with a misdemeanor. It is asserted in the opinion of the majority of the Court that the penalties are more severe in the case of felonies. This is, of course, true, but it is a fact entirely irrelevant to the issue. It is, in essence, an assertion that an unfairness that results in only a small sentence is of such a minor consequence as to be *de minimis*. The mere statement of the proposition is its own refutation. Concededly, the legislature has seen fit to confer additional safeguards to defendants accused of major crimes (preliminary hearing, e.g.); however, it is powerless to reduce the minimum safeguards of fairness that are assured by both the Wisconsin and United States Constitutions to all criminal defendants.

The opinion of the court also asserts that community prejudice is not aroused by the commission of a mis-

demeanor and that, therefore, a change of venue is needless. The simple answer to this proposition is that if there is no community prejudice, it is within the discretion of the trial judge to deny a change of venue. This determination is dependent upon the facts as they subjectively appear and not upon the objective nature of the crime or whether it is labeled a felony or a misdemeanor. The identity of the defendant and his image in the community is also relevant and may be a determining factor in whether or not there is community prejudice. (*infra*, pp. 14a, 15a)

A timely petition for rehearing was denied by the Supreme Court of Wisconsin on April 1, 1969.

### **The Federal Questions Are Substantial**

As construed by Wisconsin's highest court, W.S.A. §956.03(3) prohibits a defendant whose constitutional right to a fair trial by an impartial jury is threatened by the existence of widespread community prejudice from obtaining a change of venue unless he is charged with an offense classified as a felony.<sup>5</sup> This burden on the right to fair trial guaranteed by the federal constitution—solely on the basis of extent of the punishment allowable in a criminal case—raises serious questions under both the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

<sup>5</sup> Wisconsin law defines a felony as an offense punishable by imprisonment in the state prison; "Every other crime is a misdemeanor" W.S.A. §939.60.

## I.

**W.S.A. §956.03(3) Denies Appellant's Fourteenth Amendment Right to a Fair Trial by Totally Prohibiting a Change of Venue in a Serious Criminal Prosecution Regardless of the Extent of Community Prejudice.**

This Court has long held that a conviction for a crime cannot stand where local community prejudice has impugned the fairness of the trial. *Irvin v. Dowd*, 366 U.S. 717, 723-728 (1961). "A fair trial in a fair tribunal is a basic requirement of due process." *In Re Murchsion*, 349 U.S. 133, 136 (1955). It is not surprising, therefore, that the right to a fair trial by an imparital jury is one of the Bill of Rights guarantees made binding upon the states by the Due Process Clause of the Fourteenth Amendment.<sup>6</sup> In *Parker v. Gladden*, 385 U.S. 363 (1966), the Court held that "the command of the Sixth Amendment . . . that 'the accused shall enjoy the right to a . . . trial by an impartial jury . . . ' [is] made applicable to the states through the Due Process Clause of the Fourteenth Amendment." (385 U.S. at 364). See also *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Turner v. Louisiana* 379 U.S. 466 (1965); *Sheppard v. Maxwell*, 384 U.S. 333 (1966). Indeed, the right to an impartial jury is recognized by the

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<sup>6</sup> The decision to apply a particular guarantee of the Bill of Rights to state criminal proceedings has depended on the determination as to whether the right is "so fundamental and essential to a fair trial that it is incorporated in the Due Process Clause of the Fourteenth Amendment." (emphasis supplied) *Washington v. Texas*, 388 U.S. 14 at 17-18 (1967). In *Pointer v. Texas*, 380 U.S. 400 (1965) the Court stated "[t]hat the fact that [a] right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that [it is] a fundamental right essential to a fair trial in a criminal prosecution." (380 U.S. at 404). See also *Duncan v. Louisiana*, 391 U.S. 145 (1968). If this language provides the test, application of the guarantee of an impartial trial necessarily follows.

Constitution of Wisconsin and the decisions of the Wisconsin Supreme Court. See Wisc. Const., Art. 1, §7; *State v. Nutley* 24 Wis. 2d 527, 129 N.W. 2d 155 (1964).<sup>7</sup>

Although the Supreme Court of Wisconsin concluded that if able to adopt its own cut-off point, it would make a change of venue to protect an accused's right to an impartial trial available in all cases where the penalty was greater than six months (*infra* p. 5a), the court felt itself bound by the Wisconsin legislature's determination, in W.S.A. §956.03(3), that "a change of venue based on community prejudice" was restricted to felony cases. The court held: "we are not willing to say that the cut-off point established by the legislature is necessarily arbitrary and capricious." (*infra* p. 5a).

In reaching this conclusion the court enumerated a number of differences between felonies and misdemeanors which were asserted to support the constitutionality of W.S.A. §956.03(3):

First, the court quoted a previous decision to the effect that felonies are more seriously punished crimes than are misdemeanors.<sup>8</sup>

Second, the court reasoned that the community only prejudges the guilt of a person charged with a "hor-

<sup>7</sup> In *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968), the Court held that "trial by jury in criminal cases is fundamental to the American scheme of justice," and that the Fourteenth Amendment guarantees a right of jury trial in all state criminal cases "which—were they tried in a federal court—would come within the Sixth Amendment's guarantee."

<sup>8</sup> "... In most cases the place of imprisonment is different; the statute of limitations is twice as long for a felony as a misdemeanor; one charged with a felony is entitled to a preliminary hearing; the stigma of a felony is greater; and under the repeater statute, more severe penalties are authorized for felonies than for misdemeanors . . ." *State ex rel. Gaynon v. Krueger*, 31 Wis. 2d 609, 620, 143 N.W. 2d 437 (1966).

rendous" crime that receives "widespread and prolonged attention from the news media" and that "the general public just does not become incensed at the commission of a misdemeanor."

Third, the court argued that because of the vast number of misdemeanor prosecutions, efficiency in the administration of justice would be unduly affected by making available a change of venue for misdemeanants.

Finally, the court reasoned that while both the federal and state constitutions guarantee the right to a fair and impartial trial, other methods than a change of venue ensure a fair trial.

The grounds advanced by the Supreme Court of Wisconsin simply will not bear examination as support for a statute which decrees a total bar to any change of venue in any prosecution for any crime labelled a misdemeanor.

*First.* The right to a fair and impartial trial cannot be diluted by denying the trial court authority to change venue simply because the penalty actually suffered by the misdemeanant may—in most but not all cases—be less than in felony cases. We would seriously doubt that there is any class of criminal case, however "petty" in terms of its authorized punishment, to which the basic due process guarantee of a fair trial by a fair tribunal is inapplicable. But, however that may be, appellant's was not a "petty" case by any conceivably applicable standard. Such is the teaching of *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968), where this Court concluded that the federal Constitution guarantees a jury trial for all "serious offenses" but does not extend to "petty crimes."

While the Court declined to settle the exact location of the line between petty crimes and serious offenses, Wisconsin does not here claim—nor could it do so convincingly, in view of its six-month rule governing the appointment of counsel in misdemeanors cases, *State ex rel. Plutshak v. State Dept. of Health and Social Services*, 37 Wis.2d 713, 155 N.W.2d 567 (1968), as contrasted with the sweeping preclusion of all misdemeanors by the terms of W.S.A. §956.03(3)—that appellant was charged with a petty offense. In *Duncan*, and in *Gideon v. Wainwright*, 372 U.S. 335 (1963), in holding that the Sixth Amendment guarantee of the right to assistance of counsel is applicable to the states through the Fourteenth Amendment, the Court did not draw a line between felonies and misdemeanors as does W.S.A. §956.03(3). What the Eighth Circuit has said, construing *Gideon*, is applicable here:

Indeed, consideration of the opinion in context leads us to conclude that the right to counsel must be recognized regardless of the label of the offense if, as here, the accused may be or is subjected to deprivation of his liberty for a substantial period of time. . . . It should be remembered that the Sixth Amendment makes no differentiation between misdemeanors and felonies. The right to counsel is not contingent upon the length of the sentence or the gravity of the punishment. Rather, it provides that the guarantee extends to "all criminal prosecutions." Furthermore, we note that the phrase "all criminal prosecutions" applies not only to the right to counsel but also to the right to a jury trial. Logically the phrase should be accorded the same meaning as applied to both protections. *Beck v. Winters*, 407 F.2d 125, 128 (8th Cir. 1969).

Nor does the fact that a legislature may provide a different statute of limitations in felony cases justify the

distinction drawn by W.S.A. §956.03(3) between felons and misdemeanants. Appellant does not argue that the state must try misdemeanor and felony cases identically, or that the state cannot treat one as a more serious violation of law than the other, but only that when the basic constitutional protection of fair trial is at stake, the state cannot arbitrarily deny the important protection provided by a change of venue simply because the crime—while serious—has a lower maximum penalty than a felony.

*Second.* The Wisconsin Supreme Court upheld its construction of W.S.A. §956.03(3) on the ground that there is no likelihood of community prejudice attaching to a misdemeanor prosecution. But as Judges Heffernan and Wilkie put it in dissent: "The simple answer to this proposition is that if there is no community prejudice, it is within the discretion of the trial judge to deny a change of venue." (*infra*, p. 15a). Moreover, the Supreme Court's reasoning is refuted by the facts of this case. Appellant is a controversial figure because he has spoken out and participated in marches and demonstrations against racial discrimination in his community. It is beyond dispute that his goals have stirred many to anger and hostility against him and that his "activities" have received prolonged attention from the news media in Milwaukee. It is obvious that the general public has often "become incensed", to use the language of the Wisconsin Supreme Court (*infra*, p. 4a), at his views and behavior just as portions of the general public had "become incensed" at other civil rights leaders, such as the late Reverend Doctor Martin Luther King. It is simply erroneous to assert that men like Father Groppi and Dr. King have so little stirred those opposed to them to anger as never to prejudice their right to a fair trial and it is no accident that cases involving civil

rights leaders commonly involves prosecution for alleged misdemeanors. See e.g., *Shuttlesworth v. Birmingham*, 373 U.S. 262 (1963); 376 U.S. 339 (1964); 382 U.S. 87 (1965); — U.S. —, 22 L.ed. 2d 162, 89 S.Ct. — (1969); *Gregory v. Chicago*, — U.S. —, 22 L.ed. 2d 134, 89 S.Ct. — (1969); *Edwards v. South Carolina*, 372 U.S. 229 (1963). Community prejudice arises when the activities of a person or group challenge deeply felt beliefs and feelings. It does not depend on whether a criminal charge arising out of civil rights activity is classified by state law as a misdemeanor or a felony.

It is plain that in cases such as this involving a public figure whose civil rights activity is tied to a controversial social issue—where the personal and political leanings of the jury will often be antagonistic to the defendant—the potential for an adverse factual determination of conflicting testimony is great. In civil-rights-related prosecutions this situation is not uncommon. But because of the accepted limitations of federal and state appellate review of factual determinations by state trial courts, the only effective remedy is to guarantee the accused the right to have the crucial factual determination of guilt or innocence made initially by “impartial ‘indifferent’ jurors” *Irvin v. Dowd*, *supra* at 366 U.S. 722. Trial by twelve jurors representing a cross-section of a community less subjected to adverse publicity does not ensure that justice will be done but it does dilute the effect of any particularized bias and tends to make it likely that persons not unfairly antagonistic to the accused will participate in the fact-finding process.

*Third.* The Supreme Court of Wisconsin reasoned that the exclusion of misdemeanor cases from the change of venue authorized by §956.03(3) promotes “efficiency in the administration of justice” (*infra* p. 4a) in view of the large

numbers of misdemeanor prosecutions. Such arguments did not deter this court from extending the right to jury trial to misdemeanants in *Duncan, supra*. But granting the premise that a lot of misdemeanor cases are prosecuted, and hence potentially affected by a change-of-venue rule, it is difficult to see why motions for a change in venue should be *automatically* withheld from *all* persons charged with misdemeanors. The notion that authorizing trial judges to grant or deny a change of venue in their discretion will open the floodgates to disruption in the administration of justice is unreal. Indeed, an authoritative study has concluded that motions are rarely granted even in felony prosecutions. *Standards Relating to Fair Trial and Free Press*, 121 (A.B.A. Project on Minimum Standards For Criminal Justice, 1966). It is plain that only very few of the many misdemeanor cases prosecuted could conceivably give rise to a colorable claim for a change in venue; and, if such claims were advanced in number, trial courts would still retain enormous latitude to deny the applications.

The final reason given by the Supreme Court of Wisconsin for upholding W.S.A. §956.03(3) is that appellant had a sufficient remedy to protect his right to a fair and impartial trial by means of voir dire inquiry, a motion for a continuance, or a motion to set aside the verdict after trial. To conceive the constitutional right to an impartial trial thusly is to misconceive it and to ignore the intimate relationship between the right and the remedy of a change of venue. If voir dire inquiry, or a continuance, satisfactorily protected the right, then there would never be need for a change of venue in any case, felony or misdemeanor. The plain fact is, as explicitly recognized by this Court in *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963), and *Irvin v. Dowd*, 366 U.S. 717 (1961), that it is often impossible to determine, much less defeat, the subtle operation of prejudice in a

criminal trial in a particular community. The constitutional right to a fair trial, therefore, properly implies a right to a jury drawn from a community which has not been so exposed to prejudice that it will not likely be able to base its verdict on the evidence developed at trial, cf. *Thompson v. Louisville*, 362 U.S. 199 (1960); not merely a right to reversal if actual prejudice is shown. In some cases, a defendant may be able to obtain a fair trial panel by interrogation, or in others to put off the trial until prejudice is neutralized without undue cost to his constitutional right to a speedy trial, or in others to prove that he did not in fact receive a fair trial at the hands of a particular jury.<sup>9</sup> Perhaps in such cases a motion for change of venue would be properly denied, but there are also cases where these protective devices will be unavailing. By upholding W.S.A. §956.03(3), Wisconsin has determined that persons charged with misdemeanors can in *no* case receive what in some cases may be the only remedy that can assure them a fair and impartial trial.

It is of interest that the only decisions we have found squarely on point uphold appellant's view that the Supreme Court of Wisconsin erred in sustaining W.S.A. §956.03(3) as consonant with Fourteenth Amendment requirements. In one case, the facts are strikingly similar. *Mason v. Pamplin*, 232 F. Supp. 539 (D. Tex. 1964) *aff'd sub nom. Pamplin v. Mason*, 364 F.2d 1 (5th Cir. 1966), involved a clergyman, active in civil rights causes, accused of striking a police official in the course of being arrested in connection with a

<sup>9</sup> Common sense also rejects the notion that a defendant can obtain a fair trial and impartial jury by having a verdict set aside. Not only does this remedy put the defendant to continuous rounds of trial burdening both him and the state court system (compare *infra*, pp. 4a, 19a) but it fails to meet the constitutional requirement because it in no way ensures that the jury will ever be drawn from an unbiased source.

civil rights demonstration. His motion for a change of venue was denied because Texas statutes provided for changes of venue by reason of community prejudice only in felony cases. He was then tried and found guilty of aggravated assault upon a police officer, a misdemeanor in Texas. After exhausting his state remedies, he challenged this conviction in a habeas corpus petition in federal court. The court held that the statute authorizing change of venue only in felony prosecutions violated the Due Process Clause of the Fourteenth Amendment, reasoning that under our system of law there is an "inherent right of an individual to a change of venue" where community prejudice prevents a fair trial. A fortiori there must be a right to make a showing of prejudice—otherwise this vital constitutional right cannot be vindicated. A law which by its terms limits the right to make such a showing to felonies violates due process of law." (232 F. Supp. at 542-543) In affirming, the Court of Appeals declared that:

Due process of law requires a trial before a jury drawn from a community of people free from inherently suspect circumstances of racial prejudice against a particular defendant. (364 F.2d at 7)

The court made it clear that in its view, "the same constitutional safeguard of an impartial jury is available to a man denied his liberty . . . for a misdemeanor as a felony. (*Ibid.*)

Similarly, fifteen years ago the Supreme Court of Oregon declared unconstitutional on due process grounds state statutes permitting a change of venue in felony cases only. *State ex rel. Rico v. Biggs*, 198 Ore. 413, 255 Pac.2d 1055 (1953). The Court recognized that the right to a fair and impartial trial is of constitutional dimensions and made it clear that any statute which attempts to limit this right runs afoul of the Constitution.

After extensive study, an American Bar Association Committee has recently fashioned standards for fair trial based on those enunciated by this Court in *Sheppard v. Maxwell*, *supra*. These standards, designed to guide courts in considering questions of change of venue, do not contemplate any distinction between felonies and misdemeanors, but call for action on the part of a trial court to protect the fairness of the trial "whenever" partiality is threatened. *Standards Relating to Fair Trial and Free Press*, Section 3.2(c) p. 9 (A.B.A. Project on Minimum Standards for Criminal Justice, 1966). Appellant submits this is the proper constitutional rule and that the Supreme Court of Wisconsin erred in holding otherwise.

## II.

**For Purposes of Change of Venue There Is No Rational Basis for a Distinction Between Persons Charged With a Felony and Persons Charged With a Misdemeanor.**

The Equal Protection Clause of the Fourteenth Amendment commands that distinctions drawn by a State—whether in the exaction of pains or in the allowance of benefits—must not be irrelevant, arbitrary or invidious. Where a State chooses to grant an advantage to one class and not to others "[T]he attempted classification . . . must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." *Gulf, Colorado and Santa Fe Ry. v. Ellis*, 165 U.S. 150, 155, 159 (1897). See, e.g., *Skinner v. Oklahoma*, 316 U.S. 536 (1942); *Baxstrom v. Herold*, 383 U.S. 107 (1966).

The lesson of this Court's decisions construing the Equal Protection Clause is that there can be no difference in treatment among citizens unless there is a rational distinction between the classes affected. Or, to put it another way, where no rational distinction exists between two persons or classes, the law must treat them alike. By these standards, W.S.A. §956.03(3) is patently invidious, irrational, hence unconstitutional legislation. For purposes of the relevant constitutional requirement of a fair and impartial trial, the label attached to a crime cannot reasonably dictate the character of the procedural protections offered.

The irrationality of making the benefits of change of venue available to one class of accused citizens faced with community prejudice, while withholding them from another class is further highlighted by an examination of the terms involved in the classification. At early common law no crime was considered a felony if it did not result in a total forfeiture of the offender's land or goods or both. *Kurtz v. Moffitt*, 115 U.S. 487 (1885); *People v. Causley*, 399 Mich. 340, 300 N.W. 111 (1941). See also Goebel, *FELONY AND MISDEMEANOR* (1937). Wisconsin has defined a felony as "A crime punishable by imprisonment in the state prison," W.S.A. §939.60 and a misdemeanor as "Every other crime," *ibid*. However, there is neither historical consistency nor universal agreement on any principle which governs the selection of offenses to be felonies or misdemeanors. There is plainly nothing categorical about these categories nor anything inherent in their logic which would make rational the distinction that Wisconsin attempts to rest upon them. Legislatures can, and from time to time do, change their definition of what constitutes a felony or misdemeanor for a variety of penological purposes. Under the reasoning of the court below, they could

by such legislation incidentally collapse or expand the protection of the right to a fair trial. The Constitution cannot countenance a rule which permits such adventitious irrational and arbitrary tampering with fundamental constitutional rights.

From a constitutional perspective, for purposes of change of venue, the "felony-misdemeanor" distinction is simply irrelevant. For an analogous discussion where the constitutional right to trial by jury and right to counsel is involved, see *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Beck v. Winters*, 407 F.2d 125 (8th Cir. 1969); *Harvey v. Mississippi*, 340 F.2d 263 (5th Cir. 1965); *James v. Headley*, — F.2d — (5th Cir. 1969 No. 25,892). Since the line of demarcation between felony and misdemeanor in Wisconsin law is totally unrelated to the reasons that a change in venue is allowed, or may be constitutionally required, a statute which makes the right turn on that distinction violates the Equal Protection Clause.

## CONCLUSION

**For the Foregoing Reasons, Probable Jurisdiction  
Should Be Noted.**

Respectfully submitted,

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## APPENDIX

## APPENDIX

### Opinion of the Supreme Court of Wisconsin

STATE OF WISCONSIN,

*Respondent,*

v.

JAMES EDMUND GROPPi,

*Appellant.*

No. 38

Supreme Court of Wisconsin

Feb. 4, 1969

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This appeal arises from an incident which occurred in the city of Milwaukee, on August 31, 1967. Prior to the time of the incident, and more particularly on August 30, 1967, the mayor of Milwaukee, Henry W. Maier, caused an emergency proclamation to issue which ordered that:

“ \* \* \* marches, parades, demonstrations, or other similar activities are prohibited upon all public highways, sidewalks, streets, alleys, parks and all other public ways and public grounds within the City of Milwaukee between the hours of 4:00 o'clock P.M. and 9:00 o'clock A.M., commencing on this date, Wednesday, August 30, 1967, at 4:00 o'clock P.M. and terminating thirty (30) days thereafter.”

The appellant (hereinafter referred to as the “defendant”) Father James Edmund Groppi, was arrested on August 31, 1967, for allegedly violating the proclamation during the course of a civil rights demonstration. In the course of his arrest, defendant was alleged to have resisted the arresting officer. This appeal is concerned solely with

*Opinion of the Supreme Court of Wisconsin*

the charge of resisting an officer. Any reference to the charge resulting from the violation of the proclamation is purely incidental.

Prior to the commencement of the trial on the "resisting" charge, defendant moved for a change of venue on the grounds of community prejudice. The motion was denied on the ground that sec. 956.03(3),<sup>1</sup> Stats., provided for a change of venue for community prejudice only in felony matters. Resisting an officer is a misdemeanor.

Also prior to trial a subpoena was executed and served which ordered Henry W. Maier to appear to testify on behalf of the defendant on February 8, 1968. That subpoena was subsequently quashed following a hearing which resulted in the trial court's finding that Mayor Maier could not offer any relevant testimony to the case before the court.

After a trial by jury, the defendant was determined to be guilty of resisting an officer. He was fined \$500 and sentenced to six months in the house of correction. Sentence, however, was stayed, and defendant was placed on two years' probation. The appeal is taken from the judgment of conviction and the order of sentence.

HANLEY, Justice.

The defendant presents the following issues on this appeal:

1. Is sec. 956.03(3), Stats., unconstitutional either on its face or as applied in this case?

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<sup>1</sup> "If a defendant who is charged with a felony files his affidavit that an impartial trial cannot be had in the county, the court may change the venue of the action to any county where an impartial trial can be had. Only one change may be granted under this subsection."

*Opinion of the Supreme Court of Wisconsin*

2. May a trial court quash a subpoena which has been properly issued and served upon a witness the defendant desired to call in his defense?

*Unconstitutionality of Sec. 956.03(3), Stats.*

Appellant claims the change of venue statute is unconstitutional on several different grounds: First, that the statute, on its face, is a violation of due process as guaranteed by the Wisconsin and federal constitution; second, that the face of the statute violates the equal protection clause of the federal constitution. And, finally, it is contended that the statute was unconstitutionally applied in this case. In all cases, the reason for the alleged unconstitutionality is the same, i.e., that the change of venue based on community prejudice is limited to felony cases.

We think that there is a sufficient difference between a felony and a misdemeanor to warrant the distinction.

" \* \* \* In most cases the place of imprisonment is different; the statute of limitations is twice as long for a felony as a misdemeanor; one charged with a felony is entitled to a preliminary hearing; the stigma of a felony is greater; and under the repeater statute, more severe penalties are authorized for felonies than for misdemeanors. \* \* \* " *State ex rel. Gaynon v. Krueger* (1966), 31 Wis.2d 609, 620, 143 N.W.2d 437, 443.

Moreover, it would be extremely unusual for a community as a whole to prejudge the guilt of any person charged with a misdemeanor. Ordinarily community prejudice arises when a particularly horrendous crime has been perpetrated. These are the only crimes that receive widespread and pro-

*Opinion of the Supreme Court of Wisconsin*

longed attention from the news media. But the general public just does not become incensed at the commission of a misdemeanor.

[1] The court also takes judicial notice of the vast number of misdemeanors that are prosecuted as opposed to felonies. As a matter of necessity, the prosecution of misdemeanors has been simplified as much as possible by the legislature. This is not because the legislature is not concerned with justice, but because society demands that efficiency in the administration of justice be given consideration along with absolute fairness.

This court faced a decision similar to the one in this case in deciding whether an indigent accused of a misdemeanor was entitled to the assistance of a court-appointed attorney in his defense. At that time the court stated:

“A basic concern of this court must be to strive for greater fairness in the administration of criminal justice. This contemplates protection of the innocent from wrongful conviction, and a concern for the poor as well as for the affluent. A correlative consideration, nevertheless, must be to protect society from burdens that, if intolerable, might impair the administration of justice. Achieving the proper equilibrium between these important considerations inherently requires that standards be established, thus presenting a situation in which it is difficult to achieve an ideal result.” *State ex rel. Plutshack v. State Dept. of Health & Social Services* (1968), 37 Wis.2d 713, 721, 155 N.W.2d 549, 553, 157 N.W.2d 567.

The court decided in the *Plutshack* Case that counsel should be provided for all indigent defendants who were

*Opinion of the Supreme Court of Wisconsin*

charged with a crime which was punishable by a maximum sentence of more than six months' imprisonment. This was determined to be a reasonable cutoff point.

It is also important to recognize that in deciding the *Plutshack* Case, the court was not faced with a statute which specifically denied the appointment of counsel to indigents charged with misdemeanors. On the contrary, the applicable statute, sec. 957.26,<sup>2</sup> Stats., had recently been amended<sup>3</sup> so that counsel could be provided in misdemeanor cases. Thus the court was free to adopt the six-month cutoff.

However, in this case, the applicable statute specifies that a change of venue based on community prejudice shall only be permitted in felony cases. Were we free to adopt our own cutoff point, we would establish it at over six months, as we did in reference to the appointment of counsel. However, we are not willing to say that the cutoff point established by the legislature is necessarily arbitrary and capricious.

The court is aware that two other jurisdictions have considered whether a change of venue based on community prejudice can be limited to felony cases.<sup>4</sup> Both decided it could not be without violating the due process clause of the Fourteenth amendment to the federal constitution. Those

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<sup>2</sup> "957.26 Counsel for indigent defendants charged with felony; advice by court. (1) A person charged with a crime shall, at his initial appearance before a court or magistrate, be advised of his right to counsel and, that in any case where required by the United States or Wisconsin constitution, counsel, unless waived, will be appointed to represent him at county expense if he is financially unable to employ counsel."

<sup>3</sup> Ch. 519, Laws of 1965, amended sec. 957.26(1). Previously that section provided for the appointment of counsel only when a defendant was charged with a felony.

<sup>4</sup> *Pamplin v. Mason* (5th Cir. 1966), 364 F.2d 1; *State ex rel. Ricco v. Biggs* (1953), 198 Or. 413, 255 P.2d 1055, 38 A.L.R.2d 720.

*Opinion of the Supreme Court of Wisconsin*

cases are not precedent for this court and their reasoning does not compel us to reach the same conclusion.<sup>4a</sup>

The United States Supreme Court held in *Rideau v. Louisiana* (1963), 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663, that a denial of a change of venue, under the circumstances of that case,<sup>5</sup> amounted to a denial of due process. That case is distinguishable on two grounds. First, it involved a felony, as does every other case in the area of change of venue which has been dealt with by the Supreme Court. Second, the defendant put into the record his proof of community prejudice which was at least likely to influence the jury. No record of community prejudice was ever made in this case.

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<sup>4a</sup> The United States Supreme Court recently considered whether a state could constitutionally deny a jury trial to persons accused of a misdemeanor. *Duncan v. Louisiana* (1968), 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491.

The court held that every person had a fundamental right to a jury trial even in state prosecutions if he was charged with a "serious" crime, whereas no such right existed if a person was charged with a "petty" offense. The court refused to draw a distinct line between a petty offense and a serious offense, but the majority did state that any crime punishable by two years' imprisonment, or more, was a serious crime. The court further indicated that, under federal law, a crime involving a maximum sentence of six months, or less, was a petty offense. No opinion was expressed as to the classification of those crimes which involved a maximum sentence of more than six months but less than two years.

In Wisconsin, no misdemeanor is punishable by more than one year of imprisonment.

<sup>5</sup> The circumstances in *Rideau*, *supra*, were extreme. A twenty-minute film and sound track of the defendant's being "interviewed" by the sheriff was shown over television on three separate occasions. During the course of the interview, the defendant admitted robbery, kidnapping and murder. The Supreme Court decided, without examining the transcript of the *voir dire*, that due process required a trial before a jury drawn from a community of people who had not seen and heard the televised "interview."

*Opinion of the Supreme Court of Wisconsin*

Appellant contends that because his motion for change of venue was denied, he had no opportunity to make a record of the community prejudice. This is simply not true. Both the federal and state constitutional guarantee to every accused the right to a fair and impartial trial.<sup>6</sup> A verdict from a prejudiced jury is void<sup>7</sup> whether or not a change of venue or a continuance was requested.<sup>8</sup> On motions after verdict or on a petition for habeas corpus, a person convicted of either a misdemeanor or a felony can offer proof that he was denied his constitutional right of a fair and impartial trial.<sup>9</sup>

[2] The right to a fair and impartial trial is not synonymous with a change of venue. The only connection between a change of venue and a fair and impartial trial is that the former is one method of insuring the latter. Other methods

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<sup>6</sup> Art. I, sec. 7, Wisconsin Constitution:

"In all criminal prosecutions the accused shall enjoy the right \* \* \* to a speedy public trial by an impartial jury \* \* \*."

Sixth amendment, United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury \* \* \*."

<sup>7</sup> "Petitioner's detention and sentence of death pursuant to the *void judgment* is in violation of the Constitution of the United States and he is therefore entitled to be freed therefrom. \* \* \*"  
(Emphasis supplied.) *Irvin v. Dowd* (1961), 366 U.S. 717, 728, 81 S.Ct. 1639, 1645, 6 L.Ed.2d 751.

<sup>8</sup> This seems to be the only logical conclusion following the decision in *Sheppard v. Maxwell* (1966), 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600. The verdict of the jury was set aside based on prejudice even though no motion for a change of venue or continuance was made.

<sup>9</sup> The express holding of *Irvin v. Dowd*, *supra*, seems to be that a statute which denies a change of venue is not unconstitutional, either on its face or in its application, so long as the statute is not relied upon to deny a person his right to a fair and impartial trial.

*Opinion of the Supreme Court of Wisconsin*

of insuring a fair trial are voir dire proceedings and continuance.<sup>10</sup>

[3] The defendant here was not denied due process when his change of venue was denied because of the applicable statute. Should a rare case arise where community prejudice threatens to influence the verdict in a misdemeanor case, the defendant can rely on the antiseptic measures of continuance and *voir dire* proceedings. In the event that these measures are still not sufficient to provide an impartial jury, the verdict can be set aside after trial based on the denial of a fair and impartial trial.

[4] If the defendant in the present case feels that he was denied a fair and impartial trial (no such claim has been made to this court), the issue can be raised and evidence can be presented on a motion for a new trial based on a denial of a fair and impartial trial.<sup>11</sup>

*Quashing a Subpoena.*

Defendant also contends that it is unconstitutional to deny to a defendant in a criminal action the right to sub-

<sup>10</sup> "The remedies in publicity cases are change of venue, continuance, and careful selection of a jury." *State v. Woodington* (1966), 31 Wis.2d 151, 166, 142 N.W.2d 810, 817, 143 N.W.2d 753.

<sup>11</sup> Sec. 958.06(1), Stats., provides:

"Within *one year* after the trial and on motion of the defendant the court may grant a new trial \* \* \*." (Emphasis supplied.)

The trial in this case ended on February 9, 1968. Some motions after verdict were presented on February 12, 1968, and denied. It does not appear that the presentation of those motions would foreclose the presentation of a motion for a new trial based on an entirely different ground.

*Opinion of the Supreme Court of Wisconsin*

poena any witness even if the witness' testimony is admittedly irrelevant.

[5] The Sixth Amendment to the United States Constitution and art. I, sec. 7, of the Wisconsin Constitution guarantee to a defendant in a criminal case the right "to have compulsory process" to obtain witnesses in his behalf. This right is now incorporated in the due process clause of the Fourteenth Amendment to the federal constitution and applies equally to the several states.<sup>12</sup> It is also worthy of note that there has been no attempt to limit this right to persons charged with a felony.<sup>13</sup>

In this case, the defendant subpoenaed the mayor of Milwaukee. After the subpoena issued, an assistant city attorney, representing the mayor, moved for an order to show cause why the subpoena should not be quashed. The day before the trial a hearing was held on that order. The attorney for the city argued that the mayor had no personal knowledge of any facts which would be material to the resisting arrest charge against Father Groppi. Counsel for the defendant contended that they hoped to establish by the mayor's testimony either that the proclamation was unconstitutional on its face or that it was unconstitutionally issued. The judge took the motion to quash under consideration until the next day.

The following morning, the defendant withdrew a motion to dismiss the charge based on the unconstitutionality of the proclamation because that issue was pending in the

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<sup>12</sup> *Washington v. Texas* (1967), 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019.

<sup>13</sup> Sec. 955.04, Stats., provides:

"Any defendant shall have compulsory process to compel the attendance of witnesses in his behalf."

*Opinion of the Supreme Court of Wisconsin*

federal court and could best be determined there. The trial court then quashed the subpoena because the issue of the unconstitutionality of the proclamation had been withdrawn. The defendant insisted at that point, and during the trial, that he had a constitutional right to call the mayor.

The defendant has explained in his brief on this appeal why the testimony of the mayor was relevant to this case:

“ \* \* \* had the defendant been able to demonstrate by the testimony of Mayor Maier that the ordinance under which he was initially arrested was illegally promulgated either because of the procedures used or because it was unconstitutional or because it was applied unconstitutionally there can be no question but that the appellant could have legitimately challenged his arrest as illegal and unauthorized. \* \* \* ”

[6] We first determine that a defendant does not have an unqualified right to subpoena witnesses. This right is no more absolute than any of the other rights guaranteed by the constitution.

[7] It is readily apparent that a defendant suffers no constitutional deprivation when he is limited to subpoenaing witnesses who can offer relevant and material evidence on his behalf. The proposition is so apparent on its face that it is difficult to find legal citation to support it. However, at least one English case has considered this precise issue. In *King v. Baines* (1908), 1 K.B. 258, the defendants, who were demonstrating for women's suffrage, were arrested for breach of the peace and unlawful assembly. They subpoenaed Prime Minister Herbert Henry Asquith and Home Secretary Herbert John Gladstone to testify at their

*Opinion of the Supreme Court of Wisconsin*

trial. The subpoenas were subsequently set aside upon proof that neither subpoenaed party could give any relevant testimony at the trial. The setting aside of the subpoenas was upheld on appeal.

[8] We think a subpoena is properly quashed when a party is unable to give relevant evidence.

[9] We also decide that the testimony which the defendant sought from Mayor Maier was immaterial to the resisting arrest charge. It is not necessary to decide whether that testimony would have been relevant if the constitutionality of the proclamation was in issue. That issue was specifically withdrawn from this case.

In the absence of some showing by the defendant that the witness was necessary for his defense, the quashing of the subpoena is not a violation of a defendant's right to compulsory process.

We conclude that sec. 956.03(3), Stats., is constitutional and that the trial court's judgment of conviction and order of sentence were proper.

Judgment and order affirmed.

HALLOWS, Chief Justice (concurring).

I concur in the result only of the majority opinion because I believe with the minority that an accused has a constitutional right to a fair trial in misdemeanor cases and to attain that end may have a change of venue if he shows community prejudice. The minority opinion well states the view that sec. 956.03(3), Stats., is regulatory only of this basic right to a fair trial and is not exclusive by implication. The right to a change of venue to secure a fair trial is consistent with my belief that an accused has a constitutional right to an attorney in all misdemeanor cases,

*Opinion of the Supreme Court of Wisconsin*

which was expressed in *Sparkman v. State* (1965), 27 Wis.2d 92, 102, 133 N.W.2d 776, and again in the dissent in *State ex rel. Plutshack v. State Department of H&SS* (1968), 37 Wis.2d 713, 727, 155 N.W.2d 549, 157 N.W.2d 567.

I differ with the minority in its remedy in this case. To these facts I would apply the harmless-error rule as stated in *Whitty v. State* (1967), 34 Wis.2d 278, 149 N.W.2d 557, cert. denied 390 U.S. 959, 88 S.Ct. 1056, 19 L.Ed.2d 1155. Not every violation of a constitutional right requires a reversal or a new trial. Prejudice resulting from error or the denial of a constitutional right must be shown. In the instant case, the defendant had no difficulty in selecting and obtaining a satisfactory jury and one which on the record he does not claim was biased or unfair.

The exercise of the constitutional right to a change of venue on the ground of community prejudice is a means to secure an unprejudiced and fair jury so that a fair trial may be assured. If such a saturation of prejudice exists in a community from which the jury is drawn so as to make it difficult to select and obtain an impartial jury, then it is better to change the venue of the case than to waste time attempting to find an unprejudiced jury. But a juror's knowledge of events is to be distinguished from prejudice or predetermined opinion. One may have knowledge without prejudice. The members of a jury may be informed without the jury being prejudiced. I think also that community prejudice has little or no effect on a witness. The argument that a witness will testify differently in one county than he will in another is unconvincing. No matter where the witness testifies, he must live in the community from which he comes.

On the facts of this case, I see no reason for a reversal.

*Opinion of the Supreme Court of Wisconsin*

HEFFERNAN, Justice (dissenting).

I respectfully dissent from the opinion of the Court insofar as it holds sec. 956.03, Stats., prohibits a change of venue in misdemeanor cases and that such legislative prohibition is constitutional.

To understand what the majority has done, it is necessary to review the facts. It is crystal clear from the record that the defendant moved for a change of venue on the basis of community prejudice. Such prejudice was alleged in the underlying affidavits supporting the motion. The defendant's trial counsel also asked that the court take judicial notice of the "massive coverage by all news media in this community of the activities of this defendant \* \* \* or, in the alternative, that the defendant be permitted to offer proof of the nature and extent thereof, its effect upon this community and on the right of defendant to an impartial jury trial." This motion was denied in its entirety. The reason for such a denial, including the reason for the refusal to hear evidence of prejudice, is made clear by the remarks of the trial judge following the denial of the motion.

Counsel asked if the court was denying the motion "because the statute will not permit a change of venue on the grounds of community prejudice. \* \* \*" The court replied, "No, I'm denying the motion \* \* \* because this is a misdemeanor case and not a felony. And the Wisconsin Statute does not provide for a change of venue in a misdemeanor matter."

It is thus apparent that the judge refused to hear evidence on community prejudice solely because he concluded that the statute gave him no jurisdiction to order a change of venue even if community prejudice were shown.

*Opinion of the Supreme Court of Wisconsin*

This, I conclude, is a clear error of law, and the statute as so construed was applied unconstitutionally. The statute is procedural only. It merely specifies the duty of the judge when prejudice is apparent and the defendant is charged with a felony. It is silent upon the duty of a judge in the event one charged with a misdemeanor asks for a change of venue because of community prejudice. The prohibition that the trial judge found, at least by implication, in the statute is not apparent to this writer.

We have heretofore held, in *State v. Nutley* (1964), 24 Wis.2d 527, 129 N.W.2d 155, overruling, sub silentio, *State ex rel. Carpenter v. Backus* (1917), 165 Wis. 179, 161 N.W. 759, to the contrary, that a change of venue for community prejudice is a constitutional right independent of the legislative procedural implementation. In *Nutley*, 24 Wis.2d page 566, 129 N.W.2d page 160, we pointed out that the portion of sec. 956.03(3), Stats., providing, "Only one change may be granted under this subsection," was subject to the due process limitations of the fourteenth amendment to the United States Constitution.

In effect, this court recognized, at least in a felony case, that the power of a court to order a change of venue arose not from the statute but from its inherent power to act to assure a fair trial, and, as required, by the fourteenth amendment.

Are there any reasons why this constitutional assurance of a fair trial by the device of change of venue should be available only to one charged with a felony and not to an alleged misdemeanant?

The majority opinion concludes that it is just and proper to afford fewer constitutional guarantees of fairness to a misdemeanant than to a felon. On the face of it this proposition runs counter to all principles of Anglo-American

*Opinion of the Supreme Court of Wisconsin*

jurisprudence; however, factual distinctions, it is contended, make it fair to afford fewer protections to one charged with a misdemeanor. It is asserted in the opinion of the majority of the Court that the penalties are more severe in the case of felonies. This is, of course, true, but it is a fact entirely irrelevant to the issue. It is, in essence, an assertion that an unfairness that results in only a small sentence is of such a minor consequence as to be *de minimis*. The mere statement of the proposition is its own refutation. Concededly, the legislature has seen fit to *confer* additional safeguards to defendants accused of major crimes (preliminary hearing, e.g.); however, it is powerless to reduce the minimum safeguards of fairness that are assured by both the Wisconsin and United States Constitutions to all criminal defendants.

The opinion of the court also asserts that community prejudice is not aroused by the commission of a misdemeanor and that, therefore, a change of venue is needless. The simple answer to this proposition is that if there is no community prejudice, it is within the discretion of the trial judge to deny a change of venue. This determination is dependent upon the facts as they subjectively appear and not upon the objective nature of the crime or whether it is labeled a felony or a misdemeanor. The identity of the defendant and his image in the community is also relevant and may be a determining factor in whether or not there is community prejudice, irrespective of the nature or seriousness of the crime charged.<sup>1</sup> To say that the public is not

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<sup>1</sup> The attorney general in his addendum to the district attorney's brief acknowledged that, "Appellant is a controversial figure, but not only in Milwaukee county." While this statement was made by the attorney general to show that a trial in another county might not result in a trial free from prejudice, it is equally probative of

*Opinion of the Supreme Court of Wisconsin*

prejudiced or enraged by the commission of a misdemeanor begs the question. That is precisely what a hearing for a change of venue is intended to determine, and this is what the defendant herein sought to prove. For this Court to decree that prejudice will henceforth not exist in a trial for a misdemeanor is reminiscent of King Canute's edict to hold back the tides.

It is, of course, true that it will be only the unusual and infrequent misdemeanor cases that will become a cause celebre and arouse popular passions. Granting the premise, on which the majority opinion is in part based, that there will be few misdemeanors that will arouse the emotions of the public, how can the rare case so clog the courts with motions for change of venue that the efficient and expeditious disposition of criminal cases will be in jeopardy. The majority opinion's fears are of a bogeyman of court congestion which its own reasoning shows to be without foundation. Moreover, there is no reason why this Court should assume that motions for change of place of trial will be abused or that our courts are so supine as to tolerate such abuse.

While it may be conceded that procedurally it is within the legislature's power to adopt more expeditious methods of handling misdemeanors than felonies, it may not do so if constitutional rights are thereby encroached upon. The

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the assertion that the defendant could not have received a fair trial anywhere in the state. This, however, is no reason why a change of venue should not have been granted, for under *Nutley*, supra, this court has decided that the defendant is not remediless after one change of venue. If it developed that a fair trial could have been held nowhere in the state, a motion for continuance would then have been appropriate. The first obligation of the trial court was to consider a change of venue so the defendant could be speedily tried.

*Opinion of the Supreme Court of Wisconsin*

legislature may grant the right to a preliminary hearing to a felon, but not to a misdemeanor, but this right is statutory not constitutional. For example, it cannot, under the aegis of greater efficiency in the administration of justice, deny misdemeanants the right to jury trial guaranteed by the Wisconsin Constitution. While efficiency and economy are of great significance in cases where the courts are free to act one way or the other, they have no place in the situation now before us, where this court, as well as the legislature, is answerable to the Constitution.

The recent United States Supreme Court decision, *Duncan v. Louisiana* (May 20, 1968), 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491, pointed out that under the sixth amendment and the fourteenth amendment to the United States Constitution petty offenses could be tried before a judge only. This decision, of course, does not obviate the necessity for a jury trial for misdemeanors in a state like Wisconsin, where a jury trial is available to all defendants. *Duncan*, however, makes it crystal clear that a trial, before whomsoever held, must be fair. Justice Harlan, although dissenting in *Duncan* and agreeing that a state by its own constitution should be able to determine the necessity of a jury trial, stated there were nevertheless certain prerequisites to a system of ordered liberty, one of them being a fair trial. He said, "I should suppose it obviously fundamental to fairness that a 'jury' means an 'impartial jury.'" (Pp. 181, 182, 88 S.Ct. p. 1466.)

In the instant case, a jury is guaranteed by the Wisconsin Constitution, and *Duncan* makes it clear that a jury must be impartial. A litigant is constitutionally entitled to invoke the device of change of venue to determine whether or not a trial may be had free from the contamination of com-

*Opinion of the Supreme Court of Wisconsin*

munity prejudice. Where the trial of a misdemeanor is before a judge, under Wisconsin law he may file an affidavit of prejudice if he thinks it necessary to assure a fair trial. He should not have a lesser right to a fair and impartial trial if he invokes his constitutional prerogative of trial by jury.

Nor is *State ex rel. Plutshack v. State Department of Health and Social Services* (1968), 37 Wis.2d 713, 155 N.W.2d 549, 157 N.W.2d 567, relevant to this case. Contrary to the assertion of the majority opinion, this court, therein, was not influenced or controlled by sec. 957.26, Stats. It was controlled by the rulings of the United States Supreme Court which have been interpreted to mean that there shall be counsel whenever a "substantial sentence" may be imposed. The opinion of the Court in *Plutshack* was influenced by legislation only to the extent that we concluded that congressional legislation (Criminal Justice Act of 1964) was declaratory of constitutional requirements.

In the instant case we have elevated the legislature's enactment of sec. 956.03, Stats., to the status of a limitation on the constitutional rights of citizens accused of crime. To do so is, I believe, a misinterpretation of a statute the legislature intended to be procedural only and constitutes an abdication of a constitutional responsibility of this Court.

We are herein in no way bound or guided, as we said we were in *Plutshack*, by legislation that appears to us to be declaratory of a proper constitutional standard already found by the Supreme Court of the United States. In the instant case what the legislature had to say about change of venue in felony cases is irrelevant to a constitutional right of an alleged misdemeanor.

This writer is of the opinion that the trial court and the

*Opinion of the Supreme Court of Wisconsin*

majority of this Court interpreted the statute in such a way as to deprive misdemeanants of important constitutional rights. In *State ex rel. Ricco v. Biggs* (1953), 198 Or. 413, 255 P.2d 1055, the Oregon Supreme Court, faced with a similar statute, pointed out that such an interpretation violated the Oregon constitutional guaranty of a fair trial (similar to Wisconsin's), as well as the due process clause of the fourteenth amendment. That court pointed out, as does this dissent, that the legislative enactment does not govern whether a misdemeanor is entitled to a change of venue, for the right to a changed place of trial depends not upon legislative consent but upon the constitutional right of fair trial.

It is the opinion of this writer that the inherent power of a court to order a change of venue for community prejudice is beyond question.

This writer would also conclude that in any criminal case a court of justice has the inherent duty, where the question is raised, to inquire into the matter of community prejudice and to hold a hearing in order to exercise its discretion in respect thereto. This duty is constitutional, not statutory, and in proper circumstances should be exercised *sua sponte*.

Nor can I agree with the majority opinion's conclusion that even though a change of venue could or should have been granted, a fair trial is still assured by the procedures of the voir dire and motions after verdict.

This is hardly an argument for efficient judicial administration for if an atmosphere of prejudice or unfairness can be detected prior to trial, it is folly to spend the public's money on a trial that will be set aside.

No doubt, motions after verdict are useful safety devices to correct error that perhaps has already occurred, but the goal of the proper administration of justice is the avoid-

*Opinion of the Supreme Court of Wisconsin*

ance of error. The device of change of venue seeks the avoidance of error.

Moreover, the test of community prejudice is not whether an impartial jury can or cannot be impaneled but whether there is a "reasonable likelihood" that community prejudice exists. *Sheppard v. Maxwell* (1966), 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600.

The American Bar Association Advisory Committee on Fair Trial and Free Press at pages 126, 127, and 128 discussed the efficacy of the *voir dire* as a guaranty of a fair trial:

"It has in many jurisdictions been common practice for denial of such a motion to be sustained if a jury meeting prevailing standards could be obtained. There are two principal difficulties with this approach. First, many existing standards of acceptability tolerate considerable knowledge of the case and even an opinion on the merits on the part of the prospective juror. And even under a more restrictive standard, there will remain the problem of obtaining accurate answers on *voir dire*—is the juror consciously or subconsciously harboring prejudice against the accused resulting from widespread news coverage in the community? Thus if change of venue and continuance are to be of value, they should not turn on the results of the *voir dire*; rather they should constitute independent remedies designed to assure fair trial when news coverage has raised substantial doubts about the effectiveness of the *voir dire* standing alone.

"The second difficulty is that when disposition of a motion for change of venue or continuance turns on the results of the *voir dire*, defense counsel may be

*Opinion of the Supreme Court of Wisconsin*

placed in an extremely difficult position. Knowing conditions in the community, he may be more inclined to accept a particular juror, even one who has expressed an opinion, than to take his chances with other, less desirable jurors who may be waiting in the wings. And yet to make an adequate record for appellate review, he must object as much as possible, and use up his peremptory challenges as well. This dilemma seems both unnecessary and undesirable. \* \* \*

"The suggestion of some courts that \* \* \* [failure to exhaust all peremptory challenges] amounts to a waiver [of a right to transfer or continuance] seems to require the defendant to take unnecessary risks. If the defendant has satisfied the criterion for the granting of relief, it should not matter that he \* \* \* has failed to use his peremptory challenges, perhaps because he prefers the ills he has to others he has not yet seen."

In *State v. Nutley*, supra, 24 Wis.2d pages 565, 566, 129 N.W.2d page 172, this Court accepted the conclusion that a *voir dire* does not necessarily assure a trial free from the contamination of community prejudice:

"The United States supreme Court has held that even if a defendant has examined prospective jurors at length during a *voir dire*, and even if the jurors state that they will evaluate the issues only on the evidence presented during the trial, a defendant may still be denied a fair trial if prejudicial pretrial publicity is of such quantitative and qualitative magnitude that it is probable that the jurors predetermined the issue despite their protestations to the contrary. This rule of

*Opinion of the Supreme Court of Wisconsin*

Fourteenth amendment due process is applicable even though the defendant may have received one change of venue, pursuant to a state statute similar to sec. 956.03, Stats."

True, this court has in numerous cases looked to the *voir dire* to determine that a trial was free from the taint of prejudice. This technique, while efficacious in some cases, is directed primarily to the question of whether a trial judge abused his discretion in determining that the prejudice alleged or proved was not of such a nature as to prevent a fair trial. Here, abuse of discretion is not in question. The trial judge here relied upon his interpretation of a statute and concluded that he was precluded by law from granting a change of venue. Discretion was not exercised. Hence, the error was one of law and the usual *voir dire* cases are not directed to the issue raised herein.

Mason v. Pamplin (D.C.1964), 232 F.Supp. 539, 540, 541, 542, 543 (Affm'd Pamplin v. Mason (5 Cir. 1966), 364 F.2d 1), a case involving the right of a change of venue in a misdemeanor case where the Texas statute referred only to felonies, stated:

"The record reflects that the prospective jurors, who apparently qualified as a group, stated that they did not know petitioner; that they had not formed any opinions in the case; and that they had no prejudices against the Negro race, or against a Negro acting as counsel for petitioner. No testimony on this question, other than the sworn statement of petitioner's counsel, was offered at the hearing on the motion for new trial.

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*Opinion of the Supreme Court of Wisconsin*

"Whatever doubt may have existed prior to 1960 with respect to the inherent right of an individual to a change of venue if he demands a jury trial, and it is made to appear that in the county where the prosecution is begun an impartial jury cannot be impaneled, was dispelled by the Supreme Court in *Irvin v. Dowd*, 366 U.S. 717, 721, 81 S.Ct. 1639, 1641, 1642, 6 L.Ed.2d 751 (1960), when it recognized the proposition that a transfer may become a *necessity*, depending upon 'the totality of the surrounding facts.' Such 'totality' cannot be achieved if the court is precluded by law from hearing any competent evidence which may be offered before, during or after trial for the purpose of showing one's inability to obtain a fair and impartial trial in a particular county. \* \* \*

"The hearing on the change of venue is the first and most important step in ascertaining whether or not the accused can receive a fair and impartial trial in the county in which the prosecution is pending. The void which is left when the initial hearing is dispensed with could hardly be filled in a misdemeanor case, any more than it could in a felony case, by the subsequent voir dire examination of prospective jurors in a group, or by producing at a hearing on a motion for new trial testimony the Court has previously refused to hear.  
\* \* \*

"If the allegations made by [petitioner] had been found to be true [at a venue hearing], he would have been entitled to a change of venue, irrespective of the fact that the jurors themselves as a group indicated that they had no prejudices. As the Supreme Court said in *Dowd*: 'No doubt each juror was sincere when

*Opinion of the Supreme Court of Wisconsin*

he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father.' 366 U.S. 717, 728, 81 S.Ct. 1639, [1645, 6 L.Ed.2d 751]."

The denial of the defendant's motion, which in the alternative asked for a hearing on community prejudice, denied the defendant (contrary to the assertion of the majority opinion) an opportunity "to make a record of community prejudice." This is true because the judge made it clear that, in the case of a misdemeanor, community prejudice was irrelevant to a change of venue—there was just no statutory authority for such change. In motions after verdict defendant asked for a new trial on the ground, among others, that the court erred in denying the motion for change of venue on the assumption that the statute applied only to felony cases. This motion was again denied. The defendant also asked for a new trial on the ground that the one accorded him was unfair.

The defendant's motion was denied without hearing or explanation. It is apparent that the trial judge, relying on his interpretation of the law, refused to look to the alleged facts of community prejudice, and afforded the defendant no opportunity to make a record.

I would reverse the judgment of the circuit court and order a new trial, directing the trial court that, in the event a motion for change of venue is made, to exercise its discretion to determine whether or not the facts adduced at hearing warrant the granting of a change of venue.

I am authorized to state that Mr. Justice WILKIE joins in this dissent.

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1968

No. 1630-~~20~~ 26

**JAMES EDMUND GROPP,**

*Appellant,*

v.

**STATE OF WISCONSIN,**

*Respondent,*

ON APPEAL FROM THE SUPREME COURT  
OF WISCONSIN

**MOTION TO DISMISS APPEAL**

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1968

No. 1536

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JAMES EDMUND GROPP, I,  
*Appellant,*

*v.*

STATE OF WISCONSIN,  
*Respondent,*

---

ON APPEAL FROM THE SUPREME COURT  
OF WISCONSIN

---

---

**MOTION TO DISMISS APPEAL**

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The respondent above named moves the Court to dismiss the appeal herein on the ground that:

NO SUBSTANTIAL FEDERAL QUESTION  
IS PRESENTED

The federal questions of due process of law and equal protection of the laws sought to be presented in this case are trivial and insubstantial.

At pages 18-19 of their Jurisdictional Statement counsel rely on the claim that appellant is a controversial figure whose activities have stirred many to anger and hostility against him, etc.

Father Groppi was a controversial figure not only in Milwaukee county but throughout the state, made so by himself. The very charge against him arose out of activity designed to publicize his cause. Why undertake a slow march, 3 or 4 abreast, arms locked, half way across Milwaukee, instead of taking the bus to City Hall? Father Groppi courted arrest, yet instead of cooperating with the policemen who accommodated him, he "went limp" and made it harder for them.

He must have thought then, and perhaps the fact was, that his course of conduct gained friends and support for the movement he advocated. Yet now before this Court he asserts it made only implacable enemies and prevented a fair trial.

But if there were people who were *against* Fr. Groppi in Milwaukee county, there were also those *favorable* to him. Whether both points of view would prevail in other counties to the same extent may be questioned, since his partisans were mostly in Milwaukee.

An adequate *voir dire* examination of the jurors should suffice to sort out any who might be suspected of harboring ill will against the defendant. It is impossible to say this jury was "drawn from a community \* \* \* so exposed to prejudice that it [would] not likely be able to base its verdict on the evidence developed at trial" (App. Br. 21).

Nor is it claimed that the facts of the alleged crime were widely publicized in a manner unfavorable to appellant, so that he could not be fairly tried because of false or unfavorable notions implanted in jurors' minds.

The argument for appellant really amounts to saying that a person who supports unpopular causes and thus incurs the disapproval of the people of the state can never be tried for a charge of crime because no fair and impartial jury can be impanelled. This is not true in fact nor is it required by law.

Even if the trial court and the Wisconsin Supreme Court erred in their holding regarding the effect of sec. 956.03 (3), Wis. Stats., the error was harmless beyond a reasonable doubt since the jury was readily impanelled without difficulty in Milwaukee county, and hence the case does not merit the attention of this Court. *Chapman v. California*, (1967) 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. ed. 2d 705. (See the concurring opinion below of Chief Justice Hallows, App. 12a).

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It is therefore respectfully submitted that the appeal herein be dismissed and that certiorari be denied.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1970

No. 26

JAMES EDMUND GROPP, JR.,

*Appellant,*

—v.—

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*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

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# INDEX

	PAGE
Opinion Below .....	1
Jurisdiction .....	1
Constitutional and Statutory Provisions Involved .....	2
Question Presented .....	2
Statement .....	3
1. Events Prior to Appellant's Charge for Resisting Arrest .....	4
2. The Resisting Arrest Charge .....	6
3. Rulings of the Courts Below .....	8
Summary of Argument .....	13
ARGUMENT:	
Introduction .....	14
I. Wis. Stat. Ann. §956.03(3) Violates the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment in Denying a Defendant's Right to a Fair and Impartial Jury Trial by Totally Prohibiting a Change of Venue in Certain Serious Criminal Prosecutions Regardless of the Extent of Community Prejudice .....	15
II. Wis. Stat. Ann. §956.03(3) Violates the Equal Protection Clause of the Fourteenth Amendment in Denying Persons Charged with a Misdemeanor the Right to a Change of Venue Granted Persons Charged with a Felony ....	34
CONCLUSION: .....	38

# TABLE OF AUTHORITIES

## Cases:

Baldwin v. New York, 38 U.S.L.Wk. 4554 (1970)	..15, 29, 35
Barry v. Truax, 13 N.D. 131, 99 N.W. 769 (1904)	..17, 18, 30, 31
Baxstrom v. Herold, 383 U.S. 107 (1966)	..... 34
Beck v. Winters, 407 F.2d 125 (8th Cir. 1969)	..... 36
Bell v. Maryland, 378 U.S. 226 (1964)	..... 29
Bloom v. Illinois, 391 U.S. 194 (1968)	..... 29
Brown v. Louisiana, 383 U.S. 131 (1966)	..... 29
Cox v. Louisiana, 379 U.S. 536, 559 (1965)	..... 29
Crocker v. Justices of Superior Court, 208 Mass. 162, 94 N.E. 369 (1911)	.....17, 31
Darcy v. Handy, 351 U.S. 454 (1956)	..... 26
Delany v. United States, 199 F.2d 107 (1st Cir. 1952)	..... 23
Douglas v. California, 372 U.S. 353 (1962)	..... 34
Duncan v. Louisiana, 391 U.S. 145 (1968)	.....17, 29, 36
Edwards v. South Carolina, 372 U.S. 229 (1963)	..... 29
Enriquez v. State, 429 S.W.2d 141 (Tex. Ct. Crim. App. 1968)	..... 21
Estes v. Texas, 381 U.S. 532 (1965)	.....20, 28
Gregory v. Chicago, 394 U.S. 111 (1969)	..... 29
Griffin v. Illinois, 351 U.S. 12 (1956)	..... 34
Groppi v. Froehlich, 311 F. Supp. 765 (W.D. Wis. 1970)	..... 4
Groppi v. Leslie, 311 F. Supp. 772 (W.D. Wis. 1970)	..... 4
Gulf, Colorado and Sante Fe Ry. v. Ellis, 165 U.S. 150 (1897)	..... 34

	PAGE
Hague v. C.I.O., 307 U.S. 496 (1959) .....	29
Harms v. State, 36 Wis.2d 282, 153 N.W.2d 78 (1967) ..	37
Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965) ..	36
In re Murchison, 349 U.S. 133 (1955) .....	16, 27
Irvin v. Dowd, 366 U.S. 717 (1961) .....	16, 20, 22, 23, 33
James v. Headley, 410 F.2d 325 (5th Cir. 1969) .....	36
Juelich v. United States, 214 F.2d 950 (5th Cir. 1954) ..	21
Mason v. Pamplin, 232 F. Supp. 539 (W.D. Tex. 1964), <i>aff'd sub nom.</i> Pamplin v. Mason, 364 F.2d 1 (5th Cir. 1966) .....	32
Parker v. Gladden, 385 U.S. 363 (1966) .....	16
People v. Hryciuk, 5 Ill.2d 176, 125 N.E.2d 61 (1954) ..	23
People v. McKay, 37 Cal.2d 792, 236 P.2d 145 (1951) ..	23
People v. Ryan, 38 N.Y. Supp. 2d 806 (1942) .....	31
Pruitt v. State, 16 Wis.2d 169, 114 N.W.2d 148 (1962) ..	36
Rex v. Cowle, 2 Burr. 834, 97 Eng. Rep. 587 (1759) ..	17, 30
Rex v. Harris, 3 Burr. 1330, 97 Eng. Rep. 858 (1762) ..	17, 30
Rideau v. Louisiana, 373 U.S. 723 (1963) ..	16, 20, 22, 26, 33
Rogers v. State, 155 Tex. Crim. 423, 236 S.W.2d 141 (1951) .....	20
Rubenstein v. State, 407 S.W.2d 793 (Tex. Ct. Crim. App. 1966) .....	20
Sheppard v. Maxwell, 384 U.S. 333 (1966) .....	16, 20, 26
Shuttlesworth v. Birmingham, 373 U.S. 262 (1963); 376 U.S. 339 (1964); 382 U.S. 87 (1965); 394 U.S. 147 (1969) .....	29

Skinner v. Oklahoma, 316 U.S. 536 (1942) .....	34
State v. Albee, 61 N.H. 423, 60 Am. Rep. 325 (1881) ..	17, 31
State v. Cooper, 4 Wis.2d 251, 89 N.W.2d 816 (1958) ..	22
State v. Nutley, 24 Wis.2d 527, 129 N.W.2d 155 (1964), <i>cert. denied</i> , 380 U.S. 918 (1965) .....	16, 21, 24, 25
State v. Sawtelle, 66 N.H. 488, 32 A. 831 (1891) .....	31
State v. Stevens, 26 Wis.2d 451, 132 N.W.2d 502 (1965) ..	22
State v. Thompson, 273 Minn. 1, 139 N.W.2d 490, <i>cert. denied</i> , 385 U.S. 817 (1966) .....	32
State v. Watkins, 40 Wis.2d 398, 162 N.W.2d 48 (1968) ..	37
State v. Woodington, 31 Wis.2d 151, 142 N.W.2d 810 (1966) .....	25
State ex rel. Gaynon v. Krueger, 31 Wis.2d 609, 143 N.W.2d 437 (1966) .....	35, 37
State ex rel. Murphy v. Voss, 34 Wis.2d 501, 149 N.W. 2d 595 (1967) .....	16
State ex rel. Plutshak v. State Department of Health and Social Services, 37 Wis.2d 713, 155 N.W.2d 549, 157 N.W.2d 567 (1968) .....	36
State ex rel. Rico v. Biggs, 198 Ore. 413, 255 P.2d 1055 (1953) .....	33
State ex rel. Sauk County District Attorney v. Goll- mar, 32 Wis.2d 406, 145 N.W.2d 670 (1966) .....	16
State ex rel. Schultzer v. Roraff, 39 Wis.2d 342, 159 N.W.2d 25 (1968) .....	25
Thompson v. City of Louisville, 362 U.S. 199 (1960) ....	16, 27
Tumey v. Ohio, 273 U.S. 510 (1927) .....	16
Turner v. Louisiana, 379 U.S. 466 (1965) .....	16, 20, 27

United States v. Dioguardi, 147 F. Supp. 421 (S.D. N.Y. 1956) .....	28
United States v. Florio, 13 F.R.D. 296 (S.D.N.Y. 1952) .....	20
United States v. Parr, 17 F.R.D. 512 (S.D. Tex. 1955) .....	20, 28
United States v. Rosenberg, 200 F.2d 666 (2nd Cir. 1952), <i>cert. denied</i> , 345 U.S. 965 (1953) .....	26
United States ex rel. Bloeth v. Denno, 313 F.2d 364 (2nd Cir.), <i>cert. denied</i> , 372 U.S. 978 (1963) ....	16, 21, 23
United States ex rel. Sheffield v. Waller, 126 F. Supp. 537 (W.D. La. 1954), <i>applic. for prob. cause denied</i> , 224 F.2d 280 (5th Cir. 1955), <i>cert. denied</i> , 350 U.S. 922 (1955) .....	23
Wright v. Georgia, 373 U.S. 284 (1963) .....	29

*Constitutional and Statutory Provisions  
and Rules of Court:*

ALA. CONST. Art. IV, §75 .....	18
ALA. CODE Tit. 15, §267 (1940) .....	18
ALASKA STAT. §22.10.040 (Supp. 1962) .....	18
ARIZ. R. CRIM. P. 201-11 .....	18
ARK. CONST. Art. 2, §10 .....	18
ARK. STAT. ANN. §43-1501 (1947) .....	18
CAL. PEN. CODE §§1033.5, 1431 .....	18
COLO. CONST. Art. V, §37 .....	18
COLO. REV. STAT. ANN. §39-9-4 (1963) .....	18
CONN. GEN. STAT. REV. §54-78 (1958) .....	18
DEL. CONST. Art. I, §9 .....	18
DEL. SUPER. CT. (CRIM.) R. 21(a) .....	18

	PAGE
F. R. CRIM. P. 21(a) .....	19
FLA. STAT. ANN. §911.02 (1944) .....	18
GA. CONST. Art. VI, §2-5001 .....	18
GA. CODE ANN. §27-1101, 1201 (1935) .....	18
HAWAII CONST. Art. I, §11 .....	18
HAWAII REV. STAT. §711-18 (1968) .....	18
IDAHO CODE ANN. §§ 19-1801; 19-1304 (1948) .....	18, 32
ILL. ANN. STAT. ch. 38, §114-6 (1963) .....	18
IND. RULES OF PROCEDURE, Tr. 77, Cr 12 (1970) .....	19, 31
IOWA CODE ANN §§762.13, 778.1 (1946) .....	19, 32
KAN. STAT. ANN. §62-1318 (1964) .....	19
KY. REV. STAT. ANN. §§452.210, 452.360 (1963) .....	19
LA. CODE CRIM. P. §§621, 622 (1966) .....	19
ME. R. CRIM. P. 21, DIST. CT. CRIM. R. 21 (1969) .....	19
MD. CONST. Art. IV, §8 .....	19, 31
MD. ANN. CODE Art. 75, §44 (1957) .....	19, 31
MASS. ANN. LAWS ch. 277, §51 (1956) .....	19, 31
MICH. COMP. LAWS ANN. §762.7 (1968) .....	19
MINN. STAT. ANN. §627.01 (1947) .....	19, 32
MISS. CODE ANN. §2508 (1956) .....	19
MO. ANN. STAT. §545.430 (1949) .....	19
MO. SUP. CT. R. CRIM. P. 22.05, 30.01 .....	19
MONT. REV. CODES ANN. §95-1710 (Repl. 1967) .....	19
NEB. REV. STAT. §25-410 (1964) .....	19
NEV. REV. STAT. §174.455 (1969) .....	19
N. H. CONST. pt. I, art. 17 .....	19, 31
N. J. REV. STAT. §2A:2-13 (1952) .....	19
N. M. STAT. ANN. §21-5-3 (Supp. 1965) .....	19
N. Y. CODE CRIM. P. §344 .....	19, 31

	PAGE
N. C. GEN. STAT. §1-84 (Repl. 1969) .....	19
N. D. CENT. CODE §29-15-01 (1960) .....	19
OHIO REV. CODE ANN. §2931.29 (Page 1953) .....	19
OKLA. CONST. Art. II, §20 .....	19
OKLA. STAT. ANN. Tit. 22, §561 (1937) .....	19
ORE. REV. STAT. §§131.400, 131.420 (Supp. 1963) .....	19
PA. CONST. Art. III, §23 .....	19, 31
PA. STAT. ANN. Tit. 19, §551 (1930) .....	19, 31
R. I. GEN. LAWS ANN. §8-2-29 (1956) .....	19
S. C. CONST. Art. VI, §2 .....	19
S. C. CODE OF LAWS §17-457 .....	19
S. D. COMP. LAWS §23-28-7 (1967) .....	19, 32
TENN. CODE ANN. §40-2201 (1955) .....	19
TEX. CONST. Art. III, §45 .....	19
TEX. CODE CRIM. P. ANN. Art. 31.01 (1966) .....	19, 32
28 U.S.C. §1257(2) .....	1
UTAH CODE ANN. §77-26-1 (1953) .....	19
VT. STAT. ANN. Tit. 13, §4631 (1969) .....	19, 32
VA. CODE ANN. §19.1-224 (1950) .....	19
WASH. REV. CODE ANN. §10.25.070 (1961) .....	19
W. VA. CONST. Art. III, §14 .....	19
W. VA. CODE ANN. §62-3-13 (1966) .....	19
WIS. CONST. Art. 1, §7 .....	15
WIS. STAT. ANN. §270.16 .....	36
WIS. STAT. ANN. §939.60 .....	36
WIS. STAT. ANN. §939.62 .....	37
WIS. STAT. ANN. §946.41 .....	3
WIS. STAT. ANN. §956.03 .....	1, 2, 9, 10, 14, 15, 19, 25, 34, 36

	PAGE
WIS. STAT. ANN. §957.01 .....	16
WIS. STAT. ANN. §957.03 .....	36
WIS. STAT. ANN. §957.04 .....	36
WIS. STAT. ANN. §957.14 .....	36
WIS. STAT. ANN. §959.044 .....	36
WYO. STAT. ANN. §1-59 (1957) .....	19
WYO. R. CRIM. P. 23 (1968) .....	19
<i>Other Authorities:</i>	
56 Am. Jur., Venue §42 .....	18
AMSTERDAM, SEGAL & MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES (1967) .....	24, 27
Anno., <i>Pretrial Publicity in Criminal Case as Affecting Defendant's Right to Fair Trial—Federal Cases</i> , 10 L. Ed. 2d 663 (1964) .....	30
Austin, <i>Prejudice and Change of Venue</i> , 68 DICK. L. REV. 401 (1964) .....	28
Bailey and Golding, <i>Remedies for Prejudicial Publicity —Change of Venue and Continuance in Federal Criminal Procedure</i> , 18 Fed. B. J. 56 (1958) .....	30
Broeder, <i>Voir Dire Examinations: An Empirical Study</i> , 38 So. CAL. L. REV. 503 (1965) .....	22, 23, 24
Lipton, <i>The Classification of Crimes in Wisconsin</i> , 50 MARQ. L. REV. 346 (1966) .....	37
Note, <i>Community Hostility and the Right to an Impar- tial Jury</i> , 60 COLUM. L. REV. 349 (1960) .....	19, 24, 28
Note, <i>Impartial Jury—20th Century Dilemma: Some Solutions to the Conflict Between Free Press and Fair Trial</i> , 51 CORN. L. Q. 306 (1966) .....	23, 25

Note, <i>Wisconsin Criminal Procedure</i> , 1966 WIS. L. REV. 430 .....	22, 36
<i>Standards Relating to Fair Trial and Free Press</i> (A.B.A. Project on Minimum Standards for Criminal Justice, 1966) .....	19, 21, 22, 23, 24, 30, 31

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1970

**No. 26**

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JAMES EDMUND GROPP, *Appellant,*

—v.—

STATE OF WISCONSIN, *Appellee.*

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ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

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**BRIEF FOR APPELLANT**

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**Opinion Below**

The opinion of the Supreme Court of Wisconsin is reported at 41 Wis. 2d 312, 164 N.W.2d 266 (1969) and is set forth in the Appendix, at pp. 205-231.

**Jurisdiction**

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2), this being an appeal which draws into question the validity of Wis. STAT. ANN. §956.03(3) *infra*, p. 2, on the ground that it is repugnant to the Constitution of the United States.

Appellant was convicted of resisting arrest in the Circuit Court of Milwaukee County. A change of venue was denied

on the ground that WIS. STAT. ANN. §956.03(3) did not permit a change of venue in a misdemeanor case. On appeal, his conviction and sentence were affirmed on February 4, 1969. On April 1, 1969 a petition for rehearing was denied. Timely notice of appeal to this Court was filed in the Supreme Court of Wisconsin on May 6, 1969. As the Supreme Court of Wisconsin explicitly held that under WIS. STAT. ANN. §956.03(3) a change of venue was not permitted in a misdemeanor case, and rejected appellant's federal constitutional challenges to said statute, this matter was appropriately brought to this Court by appeal. On June 15, 1970, this Court noted probable jurisdiction.

### **Constitutional and Statutory Provisions Involved**

This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States.

This case also involves §956.03(3) of Wisconsin Statutes, which states:

If a defendant who is charged with a felony files his affidavit that an impartial trial cannot be had in the county, the court may change the venue of the action to any county where an impartial trial can be had. Only one change may be granted under this subsection.

### **Question Presented**

Whether WIS. STAT. ANN. §956.03(3), which prohibits Wisconsin trial courts from granting a change of venue in a misdemeanor case, regardless of the extent of community prejudice, violates the Sixth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment?

### Statement

Appellant James E. Groppi, a Roman Catholic priest, was charged with resisting arrest under WIS. STAT. ANN. §946.41, a misdemeanor punishable by a maximum of one year imprisonment in a county jail and a five hundred dollar fine, as a result of an incident arising out of a civil rights march in Milwaukee, Wisconsin on August 31, 1967 (A. 2-5, 72-73, 123-25).<sup>1</sup> Father Groppi was convicted by a jury of resisting arrest on February 9, 1968 (A. 50, 183-84). He was sentenced to a six months suspended sentence and placed on two years probation. He was additionally sentenced to pay a fine of five hundred dollars and costs and in default of payment within twenty-four hours, to serve another six months in jail (A. 51).<sup>2</sup>

<sup>1</sup> Specifically, appellant was charged with:

Unlawfully, knowingly resist[ing] Wilfred Buchanan, a duly appointed, qualified, and acting police officer of the City of Milwaukee, in said County, while the said Wilfred Buchanan was then and there engaged in doing an act in his official capacity, and with lawful authority, to-wit: . . . while said defendant was being carried to a police wagon, after being placed under arrest, said defendant began kicking his legs, striking said officer Wilfred Buchanan in the body with his foot; that said defendant [swore at Wilfred Buchanan]. (A. 4)

<sup>2</sup> On October 11, 1969, appellant was arrested and on October 17, 1969, his probation was revoked and he was ordered to commence serving his sentence of six months imprisonment (with credit for time served totalling six days). *Wisconsin v. Groppi*, Milwaukee County Circuit Court, Branch 12, #G-4718, Hearing to Determine Revocation of Probation, October 17, 1969. On October 27, 1969, Mr. Justice Marshall stayed execution of this sentence and ordered appellant released pending this Court's decision on jurisdiction and, assuming probable jurisdiction was noted, pending this Court's mandate.

Revocation was for violation of the conditions of probation and followed upon appellant's alleged participation in a demonstration

On February 4, 1969, the Supreme Court of Wisconsin affirmed appellant's conviction and sentence; Chief Justice Hallows concurred, and Justices Heffernan and Wilkie dissented (A. 202-31). A motion for rehearing was denied on April 1, 1969 (A. 232).

#### **1. Events Prior to Appellant's Charge for Resisting Arrest.**

Prior to and during the incidents that led to his arrest, appellant was advisor to the Youth Council of the Milwaukee Chapter of the National Association for the Advancement of Colored People (hereinafter NAACP), a group in the Milwaukee area actively supporting efforts of Negro citizens to obtain equal civil rights.

On August 30, 1967, the Mayor of Milwaukee issued a proclamation prohibiting all "marches, parades, demonstrations, or other similar activities" in Milwaukee between the hours of 4 P.M. and 9 A.M. for a thirty-day period (A. 46-47). The proclamation was the Mayor's response to several civil rights demonstrations and marches in which the Youth Council had participated "for a fair housing bill,

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in the Chambers of the Wisconsin State Assembly in Madison, Wisconsin on September 29, 1969 and subsequent conviction for contempt by that Assembly on October 1, 1969. The United States District Court for the Western District of Wisconsin subsequently granted appellant's habeas corpus application challenging his contempt conviction and sentence, on the ground that the Wisconsin Assembly had convicted him without providing him the procedural safeguards guaranteed by the Due Process Clause of the Fourteenth Amendment. *Groppi v. Leslie*, 311 F. Supp. 772 (W.D. Wis. 1970). See also the connected case of *Groppi v. Froehlich*, 311 F. Supp. 765 (W.D. Wis. 1970). The court's decision in *Groppi v. Leslie* had, of course, no effect on the previous revocation of appellant's probation, and appellant therefore remains subject to imposition of his six-month sentence of imprisonment pending this Court's decision on the merits of the instant case.

to consider the right of freedom of movement within the confines of our country . . . " (A. 126).

On August 31, 1967, Father Groppi along with an assembly of black and white people from the community met at St. Boniface's Church [located at the corner of North 11th and West Meinecke] to discuss "the Mayor's Proclamation, the demonstrations, and the arrest of Youth Council members and people of the community on the previous night" (A. 126). Between 7 P.M. and 8 P.M. three to four hundred persons from that assembly decided to march from the church to City Hall in order to "question the Mayor on the Proclamation" (A. 127). They marched very slowly in a peaceful and orderly fashion, three or four abreast, arms locked, south on North Eleventh Street (A. 72-73, 78, 83, 123). Father Groppi was one of those at the head of the march (A. 133). The group turned east on West North Avenue, and continued marching (A. 78-79, 81-83).

While the group was still on North Eleventh Street, prior to marching down West North Avenue, Inspector Ullius of the Milwaukee Police Department announced that the march was in violation of the Mayor's proclamation (A. 79). Although Ullius used a bullhorn and repeated his warning, he testified that because of the "singing and booing," he did not know how many marchers actually heard him (A. 79, 82-83). Appellant himself testified that he did not recall hearing any warning, although he did not deny that in fact one might have been given (A. 127, 133-34).

When the march continued Inspector Ullius ordered "police action, to stop the march" (A. 79-80, 83). Patrolman Armando Brazzoni, who had been walking alongside Father

Groppi, immediately arrested him (A. 83-84, 93, 98) by "grabb[ing] him around the right shoulder and collar" (A. 98). There is no contention that Father Groppi offered any resistance. Patrolman Brazzoni and a Sergeant Miller took Father Groppi to a waiting paddy wagon (A. 87, 98-99). After walking some twenty or thirty yards with the officers, and as he approached the paddy wagon (A. 135), Father Groppi "became limp in body, and sat in the street" (A. 87, 98-99, 124). Father Groppi's "going limp" was not contested (A. 73, 135),<sup>3</sup> nor was it a basis for the resisting arrest charge (A. 176-78).

## **2. The Resisting Arrest Charge.**

Events subsequent to Father Groppi's "going limp" formed the basis of the charge of resisting arrest (A. 176-78). The police and appellant's versions of these events were in sharp conflict. The State called as witnesses the three police officers who "carried" Father Groppi from his "limp" position on the street to the paddy wagon (A. 87, 98-99, 110-12). Defense counsel called Father Groppi (A. 125), two newspaper reporters (A. 152, 155), and three marchers (A. 143, 160, 166), all of whom were near Father Groppi when the alleged resistance occurred (A. 127-29, 154-55, 157-58, 145-47, 161-62, 168-69).

The police officers testified that after Patrolman Brazzoni gave his shotgun to another officer (A. 99), he picked Father Groppi up from his limp position by the "upper part of his body, by the shoulders" (A. 88). At the same time Sergeant Miller picked up his right leg and an Offi-

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<sup>3</sup> When asked why he went limp, Father Groppi responded, "I was arrested a number of times in Civil Rights demonstrations, going limp, does not constitute resisting arrest, and I went limp" (A. 135).

cer Buchanan his left leg (A. 88). Buchanan had his right stick in a hand that was around Groppi's leg (A. 112, 115). The officers then carried Father Groppi to the paddy wagon (A. 88, 100, 112). Sergeant Miller testified that as they neared the wagon "Father Groppi suddenly became violent . . . He kicked out with his left leg at Officer Buchanan, catching him in the chest and he [appellant] hollered out, 'let go my leg you .....'" (A. 89). Patrolman Brazzoni testified similarly but added that Father Groppi was "kicking his feet in a motion, like pedaling a bicycle" during the entire time he was being carried (A. 99-101). When they arrived at the wagon, Father Groppi's body jerked—"I don't know what caused the jerk" (A. 101), and at this time Father Groppi said, "I want that man's badge number" (referring to Officer Buchanan) (A. 102). Buchanan's testimony did not materially differ from Brazzoni's. He stated that when they arrived at the wagon he had been kicked by Father Groppi on the chest and knocked to one knee (A. 112).

Father Groppi's version of the facts conflicted with that of the officers. He testified that while being carried to the wagon "My foot began to hurt . . . as if someone were digging their fingernails into my foot . . ." (A. 128). This continued and as he arrived near the wagon he said to Brazzoni: "he [referring to Buchanan] is gouging his fingers into my foot," and asked, "what is that officer's badge number . . . I noticed he wasn't wearing a badge . . . what is that officer's name. . . ." Brazzoni said "that is for you to find out" (A. 129).<sup>4</sup> Groppi conceded that he "did react to the pressure placed on my leg" but only by at-

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<sup>4</sup> When Buchanan was asked on cross-examination why he didn't wear a badge on the night of August 31, he responded that he was "under orders from the Department not to wear one" and he further stated, "I don't question my superiors" (A. 114).

tempting to wiggle his foot free of the gouging. He flatly denied, however, that he had kicked Buchanan in the chest (A. 130, 139-40).

A reporter for the *Milwaukee Journal*, who was approximately 15 to 20 feet from the paddy wagon, testified that "at no time when I was in the vicinity, did I hear him use any profanity" (A. 154). The chief photographer from WISN T.V., who was also standing about fifteen feet from the paddy wagon, stated that he did not see Father Groppi kick a police officer or hear him use profanity (A. 157).

Three other defense witnesses, all of whom were arrested as marchers, testified that they saw no kicking and heard no profanity. On the contrary, they stated that Father Groppi was complaining about the gouging of his foot while being carried (A. 145-47, 161-64, 168-69).

During the jury's deliberations, some members requested to have read "all testimony—of when Father Groppi was picked up in limp position and carried to police patrol wagon." Their request was refused (A. 181-82).

### **3. Rulings of the Courts Below.**

On September 26, 1967, prior to trial, appellant moved for a change of venue from the Circuit Court of Milwaukee County "to a county where community prejudice against this defendant does not exist and where an impartial jury trial can be had" (A. 23). The motion requested the court to "take judicial notice of the massive coverage by all news media . . . of the activities of this defendant . . . or in the alternative, that the defendant be permitted to offer proof of the nature and extent thereof, its effect upon this community and on the right of defendant to an impartial jury trial." In an attached

affidavit appellant alleged that he believed he could not receive an impartial jury trial in Milwaukee County because of the community prejudice caused by the massive and frequently adverse news coverage and publicity, as well as critical editorials, he had received as a civil rights leader in all of the news media in Milwaukee County (A. 24-25). The motion was denied by the trial judge October 2, 1967, "because this is a misdemeanor case and not a felony. And the Wisconsin statute [WIS. STAT. ANN. §956.03(3)] does not provide for a change of venue in a misdemeanor matter. . . . Not in a misdemeanor matter; a felony only" (A. 9).<sup>5</sup> On December 11, 1967, appellant entered a plea of not guilty, but soon after his trial began a juror became ill and a mistrial was declared. The case was continued to February 8, 1968.

On January 10, 1968, prior to appellant's second trial, he moved to dismiss on the ground that the Wisconsin change of venue statute was unconstitutional because it allowed for a change of venue on the grounds of community prejudice only in felonies and not in misdemeanors (A. 37). At the beginning of appellant's trial, the court denied this motion noting that this was a matter for the legislature, not the courts, to resolve (A. 69-70).

After a verdict of guilty was returned by the jury on February 9, 1968, appellant moved to set aside the verdict and enter a verdict of not guilty or, alternatively, order a new trial, in part on the grounds that (1) the trial court erred in denying defendant's motion for a

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<sup>5</sup> WIS. STAT. ANN. §956.03(3) states:

If a defendant who is charged with a felony files his affidavit that an impartial trial cannot be had in the county, the court may change the venue of the action to any county where an impartial trial can be had. Only one change may be granted under this subsection.

change of venue on the ground that the change of venue statute applied only to felonies; and (2) that the change of venue statute was unconstitutional in that it denied to a defendant charged with a misdemeanor the right to a fair trial as required by the Fourteenth Amendment to the United States Constitution (A. 52-54). The trial court denied the motion.

On appeal, the Supreme Court of Wisconsin squarely rejected appellant's contentions that WIS. STAT. ANN. §956.03(3) both on its face and as applied in the instant case was in violation of due process of law as guaranteed by the Wisconsin and federal constitutions and of the Equal Protection Clause of the federal constitution.

The majority opinion specifically interpreted WIS. STAT. ANN. §956.03(3) as providing "that a change of venue based on community prejudice shall only be permitted in felony cases" (A. 211). It upheld the constitutionality of this limitation on the following grounds:

We think that there is a sufficient difference between a felony and a misdemeanor to warrant the distinction.

. . . Moreover, it would be extremely unusual for a community as a whole to prejudge the guilt of any person charged with a misdemeanor. Ordinarily community prejudice arises when a particularly horrendous crime has been perpetrated. These are the only crimes that receive widespread and prolonged attention from the news media. But the general public just does not become incensed at the commission of a misdemeanor.

The court also takes judicial notice of the vast number of misdemeanors that are prosecuted as opposed to felonies. As a matter of necessity, the prosecution of misdemeanors has been simplified as much as possible by the legislature. This is not because the legis-

lature is not concerned with justice, but because society demands that efficiency in the administration of justice be given consideration along with absolute fairness. (A. 209-10)

The majority also noted that change of venue was only one method of ensuring a fair trial, and that a defendant in a misdemeanor case could rely instead on his rights to a continuance and to challenge jurors in *voir dire* proceedings; and that he also had the alternative of proving after verdict that he had been denied a fair trial (A. 213-14).

Chief Justice Hallows concurred solely on the ground that appellant had not proved he had been prejudiced. He agreed with the minority that "an accused has a constitutional right to a fair trial in misdemeanor cases and to attain that end may have a change of venue if he shows community prejudice" (A. 230-31).

Justices Heffernan and Wilkie dissented:

The majority opinion concludes that it is just and proper to afford fewer constitutional guarantees of fairness to a misdemeanant than to a felon. On the face of it, this proposition runs counter to all principles of Anglo-American jurisprudence; however, factual distinctions, it is contended, make it fair to afford fewer protections to one charged with a misdemeanor. It is asserted in the opinion of the majority of the Court that the penalties are more severe in the case of felonies. This is, of course, true, but it is a fact entirely irrelevant to the issue. It is, in essence, an assertion that an unfairness that results in only a small sentence is of such a minor consequence as to be *de minimis*. The mere statement of the proposition is its own refutation. Concededly, the legislature has seen fit to confer additional safeguards to defendants accused of major crimes (preliminary hearing, e.g.); however, it is pow-

erless to reduce the minimum safeguards of fairness that are assured by both the Wisconsin and United States Constitutions to all criminal defendants.

The opinion of the court also asserts that community prejudice is not aroused by the commission of a misdemeanor and that, therefore, a change of venue is needless. The simple answer to this proposition is that if there is no community prejudice, it is within the discretion of the trial judge to deny a change of venue. This determination is dependent upon the facts as they subjectively appear and not upon the objective nature of the crime or whether it is labeled a felony or a misdemeanor. The identity of the defendant and his image in the community is also relevant and may be a determining factor in whether or not there is community prejudice, irrespective of the nature or seriousness of the crime charged. (A. 219-20)

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In the instant case, a jury is guaranteed by the Wisconsin Constitution, and *Duncan* makes it clear that a jury must be impartial. A litigant is constitutionally entitled to invoke the device of change of venue to determine whether or not a trial may be had free from the contamination of community prejudice. Where the trial of a misdemeanant is before a judge, under Wisconsin law he may file an affidavit of prejudice if he thinks it necessary to assure a fair trial. He should not have a lesser right to a fair and impartial trial if he invokes his constitutional prerogative of trial by jury. (A. 222-23)

The dissent also noted that defendant had been denied any opportunity to make a record of community prejudice (A. 228-29); and that the alternatives to change of venue available to a misdemeanant, such as *voir dire* procedures, could not necessarily ensure an impartial trial (A. 226; 224-28).

### Summary of Argument

It is appellant's contention in Argument I, *infra*, pp. 15-33, that the right to change of venue is, under certain circumstances, a constitutionally required means of ensuring a criminal defendant's right to an impartial jury and, therefore, that in denying appellant all opportunity for a change of venue, regardless of the extent of community prejudice, in a case in which he was constitutionally entitled to a jury trial, Wisconsin violated his rights under the Sixth and Fourteenth Amendments to the United States Constitution.

Appellant was charged with a misdemeanor punishable by a maximum in excess of six months' imprisonment, and therefore entitled under the federal constitution to trial by an impartial jury. The common law right to change of venue has been traditionally considered an integral part of the right to jury trial and is today guaranteed to criminal defendants in every state and in the federal system. And in recent years this Court has recognized that in certain cases it is a constitutionally required means of ensuring an impartial jury. While the Wisconsin Supreme Court contended that the defendant in a misdemeanor case could rely on such procedures as the *voir dire*, continuance, and post-verdict showings that he had in fact not received a fair trial, these procedures have not alone proven adequate to protect defendants against the danger of a trial contaminated by community prejudice. Therefore, in denying appellant any opportunity to show that change of venue was required to ensure a fair trial in the instant case, Wisconsin violated his federal constitutional rights to an impartial jury and to due process of the law.

Appellant further contends in Argument II, *infra*, pp. 34-37, that since Wisconsin has chosen to grant the right to change of venue to persons charged with felonies, and has recognized it as an essential means of protecting the right to a fair trial, denial of that right to appellant solely because he was charged with a misdemeanor violated his right to equal protection of the law under the Fourteenth Amendment. As the instant case reveals, misdemeanor prosecutions may well involve community prejudice threatening to a defendant's right to an impartial trial. The distinction between felony and misdemeanor in Wisconsin

is based on no coherent or consistent principle of classification, and is totally unrelated to the reasons that change of venue should be granted. Therefore, the Wisconsin statute absolutely denying persons charged with misdemeanors any right to change of venue violates the Equal Protection Clause.

## Argument

### Introduction

Both the trial court and the Wisconsin Supreme Court clearly held that WIS. STAT. ANN. §956.03(3) prohibits absolutely a change of venue in all misdemeanor cases (*supra*, pp. 9-10). Therefore this Court is squarely presented with the question whether a State which provides a right to change of venue in felony cases can deny that right to defendants in misdemeanor cases, punishable by a maximum of up to one year imprisonment. Appellant contends that such a denial constitutes a violation of the right to a fair and impartial trial, and to the equal protection of the laws as guaranteed by the Sixth Amendment and by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

It is clear that in the instant case appellant had no opportunity to show that community prejudice against him was such that he could not obtain a fair and impartial jury trial in Milwaukee County.\* But this case nevertheless is

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\* As noted *supra* pp. 8-9, in his motion for change of venue appellant asked the court to take judicial notice of the massive and prejudicial news coverage he had received or, alternatively, to allow him to offer proof as to its nature and effect, in addition to filing an affidavit describing in brief such coverage. Since the trial court denied that motion on the ground that the Wisconsin statute did not permit change of venue in a misdemeanor case, there was no occasion or opportunity for him then or subsequently to provide further proof of the nature and extent of coverage and the probability that community prejudice was such as to prevent his receiving a fair and impartial trial. The Wisconsin Supreme Court argued that appellant had an opportunity *after* conviction to prove that he had *in fact* been denied his right to an impartial

one in which the potential for violation of appellant's right to a fair and impartial trial is obvious. Appellant was a well-known and controversial civil rights leader in Milwaukee County who had been subjected to widespread and largely hostile publicity. His charge for resisting arrest arose out of what the officials of Milwaukee obviously considered a major crime—that of violating the Mayor's proclamation prohibiting marches and demonstrations. The crucial facts determinative of his guilt of the charge of resisting arrest were subject to conflicting testimony at trial. It was obviously essential that he be provided with all procedural safeguards necessary to ensure that the finders of fact would be impartial and base their verdict not on preconceived prejudice but on the evidence at trial.

## I.

**Wis. Stat. Ann. §956.03 (3) Violates the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment in Denying a Defendant's Right to a Fair and Impartial Jury Trial by Totally Prohibiting a Change of Venue in Certain Serious Criminal Prosecutions Regardless of the Extent of Community Prejudice.**

Appellant had a constitutional right to a jury trial in the instant case,<sup>7</sup> and it is clear that the right to jury trial

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trial, but it made no contention that appellant ever had an opportunity to prove that community prejudice existed such as to threaten his chances of receiving an impartial trial and to warrant granting of a change of venue.

<sup>7</sup> Appellant was charged with a misdemeanor punishable by a maximum of one year imprisonment and a five hundred dollar fine (*supra* p. 3). In *Baldwin v. New York*, 38 U.S. L. Wk. 4554 (June 22, 1970), this Court held that the States were required under the Sixth Amendment, as applied to the States through the Fourteenth, to provide defendants the right to jury trial for offenses punishable by terms in excess of six months.

Appellant was also entitled to a jury trial under the Wisconsin Constitution. Wis. CONST. Art. 1, §7 provides that in all crimes prosecuted by indictment or information the accused has a right "to a speedy public trial by an impartial jury of the county or

includes the right to an *impartial* jury,<sup>8</sup> and that this right is guaranteed to defendants in state prosecutions through the Fourteenth Amendment.<sup>9</sup> This case, therefore, poses the question whether change of venue may, in some cases, be a constitutionally required means of assuring the criminal defendant's right to an impartial jury. It is appellant's contention that it may and, therefore, that in denying appellant any right to change of venue, regardless of the extent of community prejudice, solely because he was charged with a misdemeanor, Wisconsin violated his right to an impartial jury trial as guaranteed by the Sixth and Fourteenth Amendments.

The right to change of venue is "fundamental to the American scheme of justice", and traditionally available

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district wherein the offense shall have been committed." See also WIS. STAT. ANN. §957.01(1) (1962). Wisconsin courts have found a Constitutional right to jury trial in all misdemeanors. See *State ex rel. Murphy v. Voss*, 34 Wis. 2d 501, 149 N.W.2d 595 (1967); *State ex rel. Sauk County District Attorney v. Gollmar*, 32 Wis. 2d 406, 145 N.W.2d 670 (1966).

\* The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial jury*. . . ." (Emphasis added.) The Wisconsin Constitution also guarantees an "impartial jury." See n. 7, *supra*; see also *State v. Nutley*, 24 Wis. 2d 527, 129 N.W.2d 155 (1964), *cert. denied*, 380 U.S. 918 (1965).

\* See, e.g., *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961); *Parker v. Gladden*, 385 U.S. 363 (1966); *Turner v. Louisiana*, 379 U.S. 466 (1965); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *United States ex rel. Bloeth v. Denno*, 313 F.2d 364 (2d Cir.), *cert. denied*, 372 U.S. 978 (1963); cf. *In Re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process"); *Tumey v. Ohio*, 273 U.S. 510 (1927) (due process right to a disinterested finder of fact); *Thompson v. City of Louisville*, 362 U.S. 199 (1960) (due process right to have decision by finder of fact substantially determined by evidence at trial).

"in the context of the criminal processes maintained by the American States." *Duncan v. Louisiana*, 391 U.S. 145, 149 and n. 14 (1968). It was developed early in the history of the common law courts of England,<sup>10</sup> became a part of our common law heritage,<sup>11</sup> and is now guaranteed to criminal

<sup>10</sup> See, e.g., *Rez v. Harris*, 3 Burr. 1330, 1333, 97 Eng. Rep. 858, 859 (1762) (Lord Mansfield) (dictum):

Notwithstanding the locality of some sorts of actions, or of informations for misdemeanors, if the matter cannot be tried at all, or cannot be fairly and impartially tried in the proper county, it shall be tried in the next adjoining county.

See also *Rez v. Cowle*, 2 Burr. 834, 859, 97 Eng. Rep. 587, 602 (1759):

But the law is clear and uniform, as far back as it can be traced. Where the Court has jurisdiction of the matter, if, from any cause, it cannot be tried in the place, it shall be tried as near as may be.

See generally, *Crocker v. Justices of Superior Court*, 208 Mass. 162, 94 N.E. 369 (1911) (describing at length common law history of the right to change of venue); *Barry v. Truax*, 13 N.D. 131, 99 N.W. 769, 774-75 (1904); *State v. Albee*, 61 N.H. 423, 60 Am. Rep. 325 (1881).

<sup>11</sup> See, e.g., *Crocker v. Justices of Superior Court*, 208 Mass. 162, 94 N.E. 369, 376-77 (1911):

This review demonstrates that the great weight of authority supports the view that courts, which by statute or custom possess a jurisdiction like that of the King's Bench before our Revolution, have the right to change the place of trial, when justice requires it, to a county where an impartial trial may be had.

If the matter is considered on principle and apart from authority, the same conclusion is reached. It is inconceivable that the people who had inherited the deeply cherished and hardly won principles of English liberty and who depleted their resources in a long and bloody war to maintain their rights of freemen, should have intended to deprive their courts of the power to secure to every citizen an impartial trial before an unprejudiced tribunal. . . . There can be no justice in a trial by jurors inflamed by passion, warped by prejudice, awed by violence, menaced by the virulence of public opinion or manifestly biased by any influences operating either openly or insidiously to such an extent as to poison the judgment and

defendants in every State,<sup>12</sup> as well as in the federal sys-

prevent the freedom of fair action. Justice cannot be assured in a trial where other considerations enter the minds of those who are to decide than the single desire to ascertain and declare the truth according to the law and the evidence. A court of general jurisdiction ought not to be left powerless under the law to do within reason all that the conditions of society and human nature permit to provide an unprejudiced panel for a jury trial. . . .

The purpose for which courts are established is to do justice. . . . Where questions of fact are to be settled as in all criminal prosecutions for felony, and in a large number of other causes, a jury is the instrumentality provided by the law for determining those facts. Government itself fails if a jury of just men with minds open only to the truth as shown by the evidence cannot be provided.

See also *Barry v. Truax*, 13 N.D. 131, 99 N.W. 769, 772 (1904):

It is entirely clear, therefore, that the right of trial by jury which is secured by the Constitution is the right of trial by jury with which the people who adopted it were familiar, and . . . that right . . . gave to the prosecution, as well as the defense, the right to change the place of trial when necessary to secure a fair and impartial trial.

See also 56 Am. Jur. §42:

. . . [A]ccording to the weight of authority as well as sound reasoning, common law courts have inherent power, particularly in criminal cases, to order a change of venue for purposes of securing impartial trials; the power of the English courts to transfer the trial of transitory actions, thoroughly ingrafted upon the common law long before the independence of this country, is a part of our common law heritage.

<sup>12</sup> The right to change of venue is guaranteed specifically in the Constitutions of many states, and in other states by either statute or court rule. See ALA. CONST. Art. IV, §75, ALA. CODE Tit. 15, §267 (1940); ALASKA STAT. §22.10.040 (Supp. 1962); ARIZ. R. CRIM. P. 201-11; ARK. CONST. Art. 2, §10, ARK. STAT. ANN. §43-1501 (1947); CAL. PEN. CODE §§1033.5, 1431; COLO. CONST. Art. V, §37, COLO. REV. STAT. ANN. §39-9-4 (1963); CONN. GEN. STAT. REV. §54-78 (1958); DEL. CONST. Art. I, §9, DEL. SUPER. CT. (CRIM.) R. 21(a); FLA. STAT. ANN. §911.02 (1944); GA. CONST. Art. VI, §2-5001, GA. CODE ANN. §27-1101, 1201 (1935); HAWAII CONST. Art. I, §11, HAWAII REV. STAT. §711-18 (1968); IDAHO CODE ANN. §19-1801 (1948); ILL. ANN. STAT. ch. 38, §114-6

tem.<sup>13</sup> The recent comprehensive study by the American Bar Association of the effect of prejudicial publicity on the right to a fair trial concluded that the problem was far more serious, and involved more cases, than had previously been assumed,<sup>14</sup> and that change of venue was a useful and often essential means of ensuring defendants an impartial jury.<sup>15</sup>

(1963); IND. RULES OF PROCEDURE, Tr 77, Cr 12 (1970); IOWA CODE ANN. §§762.13, 778.1 (1946); KAN. STAT. ANN. §62-1318 (1964); KY. REV. STAT. ANN. §§452.210, 452.360 (1963); LA. CODE CRIM. P. §§621, 622 (1966); ME. R. CRIM. P. 21, DIST. CT. CRIM. R. 21 (1969); MD. CONST. Art. IV, §8, MD. ANN. CODE Art. 75, §44 (1957); MASS. ANN. LAWS ch. 277, §51 (1956); MICH. COMP. LAWS ANN. §762.7 (1968); MINN. STAT. ANN. §627.01 (1947); MISS. CODE ANN. §2508 (1956); MO. ANN. STAT. §545.430 (1949), MO. SUP. CT. R. CRIM. P. 22.05, 30.01; MONT. REV. CODES ANN. §95-1710 (Repl. 1967); NEB. REV. STAT. §25-410 (1964); NEV. REV. STAT. §174.455 (1969); N. H. CONST. Pt. I, art. 17; N.J. REV. STAT. §2A:2-13 (1952); N. M. STAT. ANN. §21-5-3 (Supp. 1965); N. Y. CODE CRIM. P. §344; N. C. GEN. STAT. §1-84 (Repl. 1969); N. D. CENT. CODE §29-15-01 (1960); OHIO REV. CODE ANN. §2931.29 (Page 1953); OKLA. CONST. Art. II, §20, OKLA. STAT. ANN. Tit. 22, §561 (1937); ORE. REV. STAT. §131.400, 131.420 (Supp. 1963); PA. CONST. Art. III, §23, PA. STAT. ANN. Tit. 19, §551 (1930); R. I. GEN. LAWS ANN. §8-2-29 (1956); S. C. CONST. Art. VI, §2, S. C. CODE OF LAWS §17-457; S. D. COMP. LAWS §23-28-7 (1967); TENN. CODE ANN. §40-2201 (1955); TEX. CONST. Art. III, §45, TEX. CODE CRIM. P. ANN. Art. 31.01 (1966); UTAH CODE ANN. §77-26-1 (1953); VT. STAT. ANN. Tit. 13, §4631 (1969); VA. CODE ANN. §19.1-224 (1950); WASH. REV. CODE ANN. §10.25.070 (1961); W. VA. CONST. Art. III, §14, W. VA. CODE ANN. §62-3-13 (1966); WIS. STAT. ANN. §956.03(3) (Supp. 1967); WYO. STAT. ANN. §1-59 (1957), WYO. R. CRIM. P. 23 (1968).

Some states additionally authorize a change of venire, a procedure whereby a jury is selected from a community free from prejudice and brought to the trial district. Note, *Community Hostility and the Right to an Impartial Jury*, 60 COLUM. L. REV. 349, 365-66 (1960).

<sup>13</sup> F. R. CRIM. P. 21(a).

<sup>14</sup> *Standards Relating to Fair Trial and Free Press*, 22-25 (A.B.A. Project on Minimum Standards for Criminal Justice, 1966) [hereinafter cited as *Standards Relating to Fair Trial and Free Press*].

<sup>15</sup> *Id.* at 119-28; see also pp. 188, 248, 254.

This Court has made it clear in recent cases that a change of venue may under certain circumstances be constitutionally required under the Sixth and Fourteenth Amendments in order to protect the defendant's right to an impartial jury. Thus *Irvin v. Dowd*, 366 U.S. 717, 728 (1961), held that the defendant had a due process right to be tried "in an atmosphere undisturbed by so huge a wave of public passion . . ." <sup>16</sup> *Rideau v. Louisiana*, 373 U.S. 723 (1963), found a change of venue constitutionally required because of the nature of the pre-trial publicity, without finding any need to consider the attitudes revealed by the jurors on *voir dire*.<sup>17</sup> A number of lower courts have found methods other than change of venue inadequate, in certain circumstances, to ensure an impartial trial.<sup>18</sup> And, indeed, the Wisconsin Supreme Court itself has recognized that due

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<sup>16</sup> The statute involved in *Irvin* provided for only a single change of venue. This Court found it not subject to attack on due process grounds because it had been interpreted by the highest court of the State to permit a second change if "the totality of the surrounding facts" indicated that such a change was needed to ensure a fair trial by an impartial jury (366 U.S. at 721). The clear implication was that a statute which did absolutely prohibit a change of venue would be subject to attack on due process grounds.

<sup>17</sup> In other recent cases this Court has held that in determining whether the defendant received the impartial jury trial guaranteed by the Fourteenth Amendment it was unnecessary to find *actual* bias, but was enough that a significant *potential* for bias existed. *Turner v. Louisiana*, 379 U.S. 466 (1965); *Estes v. Texas*, 381 U.S. 532 (1965); *Sheppard v. Maxwell*, 384 U.S. 333, 351-52 (1966).

<sup>18</sup> See, e.g., *United States v. Florio*, 13 F.R.D. 296 (S.D.N.Y. 1952); *United States v. Parr*, 17 F.R.D. 512 (S.D. Tex. 1955); *Rubenstein v. State*, 407 S.W.2d 793 (Tex. Ct. Crim. App. 1966) (holding it was reversible error for trial court to deny motion for change of venue); *Rogers v. State*, 155 Tex. Crim. 423, 236 S.W.

process might require a change of venue. *State v. Nutley*, 24 Wis. 2d 527, 129 N.W.2d 155 (1964), *cert. denied*, 380 U.S. 918 (1965).

Availability of change of venue as a means for ensuring the right to an impartial trial is essential because other methods of protecting defendants against the effects of community prejudice are in many cases seriously inadequate to the task. Thus the American Bar Association's Report on *Standards Relating to Fair Trial and Free Press*, *supra* p. 19, n. 14, recognized serious deficiencies in the law presently governing such procedures as *voir dire* and continuance and recommended numerous changes to make such procedures more effective in protecting a defendant's right to a fair trial, in addition to recommending fundamental changes in the release of news to and by the press. Nevertheless the Report concluded that even assuming such changes were adopted change of venue would remain an essential means of protecting the defendant's right to a trial free from contamination by community prejudice and, indeed, recommended liberalization of change of venue practice. It is certainly clear that under *present* law, in Wisconsin as elsewhere, other methods of protecting the

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2d 141 (1951) (reversing on ground that failure to grant change of venue violated defendant's right to impartial trial); *Enriquez v. State*, 429 S.W.2d 141, 142 (Tex. Ct. Crim. App. 1968) (dictum) ("... it is apparent that the question of change of venue has become a question of constitutional dimension under the recent decisions of the Supreme Court of the United States"). See also *United States ex rel. Bloeth v. Denno*, 313 F.2d 364 (2d Cir.), *cert. denied*, 372 U.S. 978 (1963); *Juelich v. United States*, 214 F.2d 950 (5th Cir. 1954).

defendant's right to an impartial trial are often wholly inadequate.<sup>19</sup>

The Wisconsin Supreme Court contended that the defendant in a misdemeanor case could rely on "the antiseptic measures of continuance and *voir dire* proceedings" [A. 214].

But this Court explicitly recognized in *Irvin v. Dowd* and *Rideau v. Louisiana*, *supra*, p. 20, that *voir dire* may be inadequate because it is often impossible to determine, much less defeat, the subtle operation of prejudice in a criminal trial in a particular community.<sup>20</sup> *Voir dire* is at best of limited effectiveness in determining whether jurors are prejudiced *first* because it depends on an unrealistic faith in jurors' capacity to be completely candid about their

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<sup>19</sup> Thus, for example, in *State v. Stevens*, 26 Wis. 2d 451, 132 N.W.2d 502 (1965), the trial judge's method of determining whether the jury had heard an allegedly prejudicial radio broadcast was to ask them *en bloc*, prefacing his question with a reminder that he had admonished them previously not to listen to any broadcast relating to the trial; when no juror answered he asked them whether they had followed his admonition and a number of voices answered yes; this procedure was upheld on appeal. It is the general practice in Wisconsin to allow the jury to separate until the cause is submitted to it for final deliberation except in capital or life imprisonment cases. *State v. Cooper*, 4 Wis. 2d 251, 89 N.W.2d 816 (1958); Note, *Wisconsin Criminal Procedure*, 1966 WIS. L. REV. 430, 479.

<sup>20</sup> On the ineffectiveness of *voir dire* see generally *Standards Relating to Fair Trial and Free Press*, 54-67, 75, 130-38. See also Broeder, *Voir Dire Examinations: An Empirical Study*, 38 So. CAL. L. REV. 503 (1965). This study was based on a University of Chicago jury project which examined 23 jury trial cases in a federal district court in the mid-west, and included interviews of lawyers and of 225 jurors. It found that the *voir dire* examinations were "perfunctory, stilted affairs, quickly concluded . . ."; and that *voir dire* was grossly ineffective in weeding out unfavorable jurors and even in getting information that would show them to be unfavorable (pp. 503, 505, 528).

opinions and ability to act impartially. Jurors are under a variety of pressures in the *voir dire* situation to assert that they *can* act impartially,<sup>21</sup> and empirical studies have recently given support to the widely-held assumption that they are in fact less than candid.<sup>22</sup>

But even assuming that jurors were completely candid, the fact is that the *voir dire* is a totally ineffective ~~tool for~~ getting at the *unconscious* prejudices which are the most serious threat to a defendant's right to a fair trial.<sup>23</sup>

Defense counsel are, of course, in an extremely difficult position in attempting to get at prejudice, conscious or unconscious, since they run the risk of antagonizing jurors

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<sup>21</sup> *Broeder, supra* n. 20, 38 So. CAL. L. REV. at 526 ("Once in court almost all veniremen wanted to be selected and, in addition, most felt that being challenged would adversely reflect upon their ability to be fair and impugn their good faith"); *Standards Relating to Fair Trial and Free Press*, 57. See *Irvin v. Dowd*, 366 U.S. 717, 728 (1961):

No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father.

<sup>22</sup> *Broeder, supra* n. 20, 38 So. CAL. L. REV. at 506, 513-15, 528; *Standards Relating to Fair Trial and Free Press*, 57, 61, 186-87.

<sup>23</sup> *Standards Relating to Fair Trial and Free Press*, 61-66.

For cases reversing on the grounds that jurors' statements of impartiality simply cannot be accepted in the face of significant potential for prejudice; see, e.g., *Irvin v. Dowd*, 366 U.S. 717, 728 (1961); *United States ex rel. Bloeth v. Denno*, 313 F.2d 364 (2nd Cir.), cert. denied, 372 U.S. 978 (1963); *Delany v. United States*, 199 F.2d 107 (1st Cir. 1952); *United States ex rel. Sheffield v. Waller*, 126 F. Supp. 537, 542 (W.D. La. 1954), *applic. for prob. cause denied*, 224 F.2d 280 (5th Cir. 1955), cert. denied, 350 U.S. 922 (1955); *People v. McKay*, 37 Cal. 2d 792, 236 P.2d 145 (1951); *People v. Hryciuk*, 5 Ill. 2d 176, 184, 125 N.E.2d 61, 65 (1954). See generally Note, *Impartial Jury—20th Century Dilemma: Some Solutions to the Conflict Between Free Press and Fair Trial*, 51 CORN. L. Q. 306, 316 (1966).

by such attempts, during a proceeding which constitutes their first contact with the jury and serves as an important opportunity for engaging its sympathy.<sup>24</sup>

Finally, even assuming effectiveness of *voir dire* in eliminating jurors likely to be prejudiced, in a case which has received a great deal of publicity it may be impossible to obtain an impartial jury except by limiting it to that part of the public which is uninformed of and disinterested in public affairs and hardly likely to constitute the best jurors. It is for this reason, at least in part, that *voir dire* practice allows jurors to sit who have not only read or heard about the case, but have formed opinions of the defendant's guilt, so long as such opinions are not absolutely fixed, and the juror can assert he will be able to decide on the evidence.<sup>25</sup> In a time of increasing news coverage this may be necessary to ensure that the informed, intelligent public can qualify as jurors, but it is also another reason why change of venue is of increasing importance in protecting the right to a fair trial.

While a continuance may sometimes serve the same function as a change of venue, by allowing pervasive community prejudice to dissipate, there are obvious reasons

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<sup>24</sup> AMSTERDAM, SEGAL & MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES (1967) §339 [hereinafter cited as AMSTERDAM TRIAL MANUAL]; BROEDER, *supra* n. 20, 38 SO. CALIF. L. REV. at 505, 526-27 (Broeder points out the danger of antagonizing the court as well as jurors by prolonged examinations); *Standards Relating to Fair Trial and Free Press*, 126-27.

<sup>25</sup> This is the rule both in Wisconsin (*State v. Nutley*, 24 Wis. 2d 527, 129 N.W.2d 155, 162-63 (1964), *cert. denied*, 380 U.S. 918 (1965)), and generally (see *e.g.*, Note, *Community Hostility and the Right to an Impartial Jury*, 60 COLUM. L. REV. 349, 356-59 (1960); *Standards Relating to Fair Trial and Free Press*, 59-60, 126-27, 249; see also AMSTERDAM, TRIAL MANUAL §§326-340).

why it often cannot be an effective substitute: for example, publicity may revive when the case is brought to trial, or delay may be prejudicial by allowing for the death or disappearance of witnesses, or otherwise violate the defendant's constitutional right to a speedy trial.<sup>26</sup>

The Wisconsin Supreme Court has itself recognized that *voir dire* and continuance are not alone sufficient to guarantee an impartial trial in all cases.<sup>27</sup> Similarly the Wisconsin Legislature has recognized the importance of change of venue as a means for ensuring a fair trial: not only is it available in all felony cases, but the right to change of venue exists in *all* cases tried by the court regardless of whether they are felonies, misdemeanors, ordinances or traffic cases. WIS. STAT. ANN. §956.03 (1965).

The Wisconsin Supreme Court also contended that the right to change of venue in misdemeanor cases could be denied because the defendant had the alternative of proving after conviction that he had in fact been denied a fair and impartial trial. This is obviously a constitutionally inadequate alternative. This Court has recognized in a number of recent cases that *actual* prejudice may be impossible to prove and for that reason rules must be fash-

<sup>26</sup> See *e.g.*, Note, *supra* n. 23, 51 CORN. L. Q. 306 at 314-15 (1966).

<sup>27</sup> See, *e.g.*, *State v. Nutley*, 24 Wis. 2d 527, 129 N.W.2d 155 (1964), *cert. denied*, 380 U.S. 918 (1965), *supra* p. 21, noting that due process may require change of venue; *State ex rel. Schuster v. Roraff*, 39 Wis. 2d 342, 159 N.W.2d 25, 31 (1968) ("It is true the ineffectiveness of *voir dire* and judicial admonition to correct prejudice have been recognized. . . . But the ineffectiveness of such methods depends on the particular circumstances in each case"); *cf. State v. Woodington*, 31 Wis. 2d 151, 166, 142 N.W.2d 810, 817 (1966) ("the remedies in publicity cases are change of venue, continuance, and careful selection of a jury").

ioned based on the *potential* for prejudice.<sup>28</sup> Additionally, such a remedy is highly inefficient and disruptive of the administration of justice. It puts the defendant to potentially continuous rounds of trial, burdening both him and the judicial system, and it in no way ensures that the jury will ever be drawn from an unbiased source. This Court recognized in *Sheppard v. Maxwell*:

. . . we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception.<sup>29</sup>

If, then, change of venue may, depending on the circumstances of the particular case, be a necessary means of ensuring an impartial jury trial, it is clear that Wisconsin cannot entirely deny the right to change of venue in all misdemeanor cases. Since the misdemeanor charged in the instant case involved a penalty in excess of six months' imprisonment, appellant was entitled under the federal constitution to an impartial jury trial (*supra* pp. 15-16, nn. 7-9) and, therefore, to all procedures essential to ensure that the jury provided was in fact impartial. Moreover, since Wisconsin itself provides a right to jury trial in *all* misdemeanors (*supra* n. 7, pp. 15-16), the right to change of venue cannot be limited to cases where the maximum penalty exceeds six months. The right to "[a]

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<sup>28</sup> See *Rideau v. Louisiana*, 373 U.S. 723 (1963) and cases cited *supra* n. 17.

<sup>29</sup> 384 U.S. 333, 363 (1966). Thus reversals are often denied on the grounds that defendant should have sought relief from the effects of prejudicial publicity prior to trial. See, e.g., *Darcy v. Handy*, 351 U.S. 454, 462-64 (1956); *United States v. Rosenberg*, 200 F.2d 666 (2nd Cir. 1952), *cert. denied*, 345 U.S. 965 (1953).

fair trial in a fair tribunal is a basic requirement of due process,"<sup>30</sup> and cannot be denied even in so-called "petty" offenses.<sup>31</sup> If a state chooses to provide a jury as the trier of fact, then it is bound under the federal constitution to ensure that that jury is impartial.<sup>32</sup>

The Wisconsin Supreme Court attempted to justify denial of the right to a change of venue in misdemeanor cases on the ground that ordinarily the community only prejudges the guilt of a person charged with a "horrendous" crime since only such crimes receive "widespread and prolonged attention from the news media," and that "the general public just does not become incensed at the commission of a misdemeanor" (A. 209). But as the dissent put it: "The simple answer to this proposition is that if there is no community prejudice, it is within the discretion of the trial judge to deny a change of venue" (A. 220). Moreover, as noted *supra* p. 25, Wisconsin itself provides for a change of venue on grounds of community prejudice in cases tried to the court whether they be felonies, misdemeanors, ordinances or traffic cases.<sup>33</sup> While it may well be true that felonies are more likely, on the whole, to involve problems of community prejudice,

<sup>30</sup> *In re Murchison*, 349 U.S. 133, 136 (1955).

<sup>31</sup> See, e.g., *Thompson v. Louisville*, 362 U.S. 199 (1960), finding a violation of the due process right to a fair trial in a case involving conviction of an ordinance in a police court.

<sup>32</sup> See, e.g., *Turner v. Louisiana*, 379 U.S. 466 (1965), and other cases cited *supra*, n. 9; see generally AMSTERDAM, TRIAL MANUAL §315.

<sup>33</sup> This raises the additional question as to whether Wisconsin has placed an unconstitutional burden on the right to jury trial in misdemeanor cases by allowing for a change of venue on grounds of community prejudice only where the defendant is tried by the court.

the factors contributing to such prejudice are varied and may have little or nothing to do with whether the crime charged is technically classified as a felony or a misdemeanor. Thus prejudice may be aroused because of activities related to but not contained in the technical charge,<sup>34</sup> because of the controversial character of the person charged,<sup>35</sup> or because the crime affected a large number of people in the community.<sup>36</sup>

Indeed, the Wisconsin Supreme Court's reasoning is refuted by the facts of this case. Appellant is a controversial figure who has spoken out and participated in marches and demonstrations against racial discrimination in his community. It is beyond dispute that his goals and activities have stirred many to anger and hostility against him, and have received prolonged attention from the news media in Milwaukee. It is obvious that the general public has often "become incensed," to use the language of the Wisconsin Supreme Court, at his behavior, just as portions of the general public became incensed at that of other civil rights leaders. His charge of resisting arrest, while technically a misdemeanor, arose out of what the officials of Milwaukee obviously considered a crime of major proportions—that of violating the Mayor's proclamation by leading a march. It is simply erroneous to assert that men

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<sup>34</sup> See, e.g., *United States v. Dioguardi*, 147 F. Supp. 421 (S. D. N.Y. 1956) (continuance granted; conspiracy to transport person in interstate commerce to avoid prosecution for having blinded and disfigured well-known newspaper columnist by throwing acid in his face).

<sup>35</sup> *Estes v. Texas*, 381 U.S. 532 (1965); *United States v. Parr*, 17 F.R.D. 512 (S.D. Tex. 1955); Austin, *Prejudice and Change of Venue*, 68 DICK. L. REV. 401, 402 (1964).

<sup>36</sup> See Note, *Community Hostility and the Right to an Impartial Jury*, 60 COLUM. L. REV. 349, 364 (1960).

like Father Groppi have so little stirred those opposed to them to anger as never to prejudice their right to a fair trial in a misdemeanor case; and it is no accident that cases involving civil rights leaders commonly involve prosecution for technically minor offenses.<sup>37</sup> Community prejudice arises when the activities of a person or group challenge deeply felt beliefs and feelings, and does not depend on whether a particular criminal charge arising out of those activities is classified as a misdemeanor or a felony.

The Supreme Court of Wisconsin also reasoned that limitation of the right to change of venue to felony cases promoted "efficiency in the administration of justice" (A. 210) in view of the large numbers of misdemeanor prosecutions. Such arguments did not deter this court from extending the right to jury trial in *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Bloom v. Illinois*, 391 U.S. 194 (1968); or *Baldwin v. New York*, 38 U.S. L. Wk. 4554 (1970). Moreover these cases granted defendants a *right*, exercisable at their option. Change of venue is a remedy dependent on the trial judge's discretionary decision as to whether or not it is in fact necessary to ensure an impartial trial. Thus the notion that authorizing trial

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<sup>37</sup> Thus the civil rights movement has often stimulated local hostility by activities such as marching, sitting-in and demonstrating, which have resulted in arrests for such offenses as parading without a permit, distributing leaflets, breach of the peace, obstruction of public passages, picketing, trespass, disorderly conduct, and refusing to obey police orders. See, e.g., *Shuttlesworth v. Birmingham*, 373 U.S. 262 (1963); 376 U.S. 339 (1964); 382 U.S. 87 (1965); 394 U.S. 147 (1969); *Gregory v. Chicago*, 394 U.S. 111 (1969); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Hague v. C.I.O.*, 307 U.S. 496 (1959); *Cox v. Louisiana*, 379 U.S. 536 (1965); 379 U.S. 559 (1965); *Bell v. Maryland*, 378 U.S. 226 (1964); *Brown v. Louisiana*, 383 U.S. 131 (1966); *Wright v. Georgia*, 373 U.S. 284 (1963).

judges to grant a change of venue in misdemeanor cases will open the floodgates to disruption of the administration of justice is unreal. Indeed, studies have revealed that change of venue motions in both felony and misdemeanor cases are rarely made and almost never granted.<sup>35</sup>

Wisconsin's practice of prohibiting entirely the right to change of venue in all misdemeanor cases is almost without precedent. At common law the right to change of venue existed in all courts of general criminal jurisdiction, and no distinction was made between misdemeanors and felonies.<sup>36</sup> The right was considered an integral part of the

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<sup>35</sup> *Standards Relating to Fair Trial and Free Press*, 121, 188, 248, 254. See also Bailey and Golding, *Remedies for Prejudicial Publicity—Change of Venue and Continuance in Federal Criminal Procedure*, 18 Fed. B. J. 56, 64 (1958) (since promulgation of F. R. CRIM. P. 21(a), in 1947, permitting change of venue in misdemeanors as well as felonies, only two reported cases in which change of venue had been granted). See generally Anno, *Pretrial Publicity in Criminal Case as Affecting Defendant's Right to Fair Trial—Federal Cases*, 10 L. Ed. 2d 663 (1964).

<sup>36</sup> See, e.g., *Rex v. Harris*, 3 Burr. 1330, 1333, 97 Eng. Rep. 858, 859 (1762) (Lord Mansfield) (dictum), involving motion for change of venue in a misdemeanor case, quoted *supra* n. 10; *Rex v. Cowle*, 2 Burr. 834, 860, 97 Eng. Rep. 587, 602 (1759), *supra* n. 10, citing a number of cases involving misdemeanors. In *Barry v. Truax*, 13 N.D. 131, 99 N.W. 769, 774 (1904), the court stated:

In England the King's Bench had general supervisory jurisdiction, in criminal cases, coextensive with the kingdom, and a change of the place of trial from the county of the offense in criminal cases was effected by aid of a writ of certiorari issued by that court. . . . It will appear from an examination of these cases . . . that no distinction was made between misdemeanors and felonies, except that in case of a felony the showing by a defendant that a fair and impartial trial could not be had ~~must~~ be more conclusive than in case of a mere misdemeanor (emphasis added).

The court went on to say that the Queen's Bench also had the same jurisdiction to change venue in a misdemeanor as in a felony

right to jury trial.<sup>40</sup> And in this country today the right to change of venue is generally guaranteed in all felonies and misdemeanors or in all courts of general criminal jurisdiction.<sup>41</sup> The American Bar Association's *Standards Relating to Fair Trial and Free Press* contemplate no distinction between felonies and misdemeanors, but provide

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(99 N.W. at 775). See generally *Crocker v. Justices of Superior Court*, 208 Mass. 162, 94 N.E. 369 (1911), quoted *supra*, n. 11.

<sup>40</sup> See *Barry v. Truax*, 13 N.D. 131, 99 N.W. 769, 772 (1904), quoted *supra*, n. 11.

<sup>41</sup> See constitutional and statutory provisions, and court rules cited *supra* n. 12.

Some states provide for a different standard of proof in less serious cases. Thus Indiana and Maryland provide an absolute right to change of venue in capital cases, but in noncapital cases the defendant must show that he cannot obtain a fair trial without a change. IND. RULES OF PROCEDURE, Tr 77, Cr 12 (1970); MD. CONST. Art. IV, §8, MD. ANN. CODE Art. 75, §44 (1957). And in Pennsylvania the Constitution provides for the right to change of venue in all "criminal cases"; the statute provides for change of venue in felonies whenever the defendant shows the court a fair trial can't be had, but in all other criminal cases the defendant is entitled to change of venue only after he has made an unsuccessful attempt to select an impartial jury and files an affidavit by some credible witness alleging he can't get a fair trial. PA. CONST. Art. III, §23, PA. STAT. ANN. Tit. 19, §551 (1930).

The New Hampshire constitutional provision providing for change of venue in "cases of general insurrection" has been interpreted as limiting the right to change of venue only by the state and not the defendant. N.H. CONST. Pt. I, Art. 17; *State v. Sawtelle*, 66 N.H. 488, 32 A. 831 (1891). *State v. Albee*, 61 N.H. 423, 60 Am. Rep. 325 (1881), specifically held that notwithstanding the constitutional language, courts of general jurisdiction had inherent common law power to change venue in criminal cases on the defendant's motion. N.Y. CODE CRIM. P. §344 provides for change of venue in cases prosecuted by indictment, but *People v. Ryan*, 38 N.Y. Supp. 2d 806 (1942), held that a defendant charged by information had a right to change of venue if he could show danger of not obtaining a fair trial. MASS. ANN. LAWS ch. 277, §51 provides for a change of venue in capital crimes, but *Crocker v. Justices of Superior Ct.*, 208 Mass. 162, 94 N.E. 369 (1911), held that this statute was only declaratory of rights al-

for change of venue in all criminal cases whenever there is danger that a fair trial cannot be had (section 3.2, pp. 8-10).

The only cases appellant has found dealing with statutes similar to Wisconsin's have found the denial of change of venue in misdemeanor cases unconstitutional. *Mason v. Pamplin*, 232 F. Supp. 539 (W.D. Tex. 1964), *aff'd sub nom. Pamplin v. Mason*, 364 F.2d 1 (5th Cir. 1966) (decided prior to this Court's decisions in *Duncan* and *Baldwin*, *supra*), involved a strikingly similar factual situation. There a clergyman, active in civil rights causes, was accused of striking a police official in the course of being arrested in connection with a civil rights demonstration. He was charged with aggravated assault upon a police officer, a misdemeanor in Texas. His motion for a change of venue was denied because Texas statutes provided for change of venue by reason of community prejudice only

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ready existing, and that it could not limit the inherent right of courts of general jurisdiction to grant changes of venue in all criminal cases.

Idaho may limit the right to change of venue to offenses prosecuted by indictment. IDAHO CODE ANN. §19-1801 (1948); but see §19-1304. IOWA CODE ANN. §778.1 (1946) appears to limit change of venue to felony cases, but §762.13 provides for change of venue in the justice court in nonindictable offenses. MINN. STAT. ANN. §627.01 (1947) provides for change of venue in cases where the offense is punishable by death or imprisonment in the state prison; but in *State v. Thompson*, 273 Minn. 1, 139 N.W.2d 490 (1966), *cert. denied*, 385 U.S. 817 (1966), the court said that this same statute's provision that only one change of venue could be had could not limit a defendant's right to a further change if it was necessary to protect the right to a fair trial.

A number of states have recently amended their statutes or rules to specifically provide for change of venue in misdemeanors and other non-felony offenses. See, *e.g.*, TEX. CODE CRIM. P. ANN. Art. 31.01 (1966) ("any case of felony or misdemeanor"); S.D. COMP. LAWS §23-28-7 (1967); VT. STAT. ANN. Tit. 13, §4631 (1969) (person under information, complaint or indictment for any offense can move for change of venue).

in felony cases. Subsequent to his trial, conviction, and exhaustion of state remedies, a federal court held that the change of venue statute violated the Due Process Clause of the Fourteenth Amendment, reasoning that *Irvin* made clear, if there was any doubt before, the "inherent right of an individual to a change of venue" where community prejudice threatens a fair trial (232 F. Supp. at 541). The court found, therefore, that denial of opportunity to show prejudice on a motion for change of venue could not be remedied by *voir dire* proceedings or by post-verdict motions (232 F. Supp. at 542-43). In affirming, the Fifth Circuit declared that: "[d]ue process of law requires a trial before a jury drawn from a community of people free from inherently suspect circumstances of racial prejudice against a particular defendant"; and held that "the same constitutional safeguard of an impartial jury is available to a man denied his liberty . . . for a misdemeanor as a felony."<sup>42</sup>

Similarly, long before this Court's decisions in *Irvin* and *Rideau*, *supra*, the Supreme Court of Oregon recognized that the federal and state constitutional rights to an impartial trial included the right to a change of venue, and declared unconstitutional on due process grounds state statutes permitting a change of venue in felony cases only. *State ex rel. Rico v. Biggs*, 198 Ore. 413, 255 P.2d 1055 (1953).

Appellant submits, in conclusion, that Wisconsin's statute denying defendants in misdemeanor cases the right to a change of venue violates the Sixth and Fourteenth Amendments to the United States Constitution.

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<sup>42</sup> 364 F.2d at 7. The court found immaterial the fact that there was no evidence of community prejudice in the record and that the *voir dire* did not demonstrate community prejudice (364 F.2d at 6-7).

## II.

**Wis. Stat. Ann. §956.03(3) Violates the Equal Protection Clause of the Fourteenth Amendment in Denying Persons Charged With a Misdemeanor the Right to a Change of Venue Granted Persons Charged With a Felony.**

Apart from whether a criminal defendant is constitutionally entitled to a right to change of venue in order to protect his right to an impartial jury trial, it is at least clear that where a state grants a right to change of venue to some criminal defendants, it cannot deny that right to any arbitrarily selected class of defendants.<sup>43</sup> Where a State chooses to grant an advantage to one class and not to others "[T]he attempted classification . . . must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."<sup>44</sup> While absolute equality is not required, it is at least clear that a State cannot discriminate irrationally in providing criminal defendants with procedural protections it deems an important part of its system of criminal justice. See, e.g., *Douglas v. California*, 372 U.S. 353, 356-57 (1962).

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<sup>43</sup> Thus in *Griffin v. Illinois*, 351 U.S. 12, 18 (1956), this Court held that where a State grants appellate review, even though it is not required to do so by the Federal Constitution, it can't grant it in a manner that discriminates against an arbitrarily selected class, without violating the Equal Protection Clause of the Fourteenth Amendment.

<sup>44</sup> *Gulf, Colorado and Santa Fe Ry. v. Ellis*, 165 U.S. 150, 155, 159 (1897); *Skinner v. Oklahoma*, 316 U.S. 536 (1942); *Bazstrom v. Herold*, 383 U.S. 107 (1966).

The right to change of venue which Wisconsin grants all felony defendants is clearly considered a fundamental procedural safeguard, essential to protect the defendant's right to an impartial jury trial. See p. 25 and n. 27, *supra*. It is appellant's contention that it is a violation of Equal Protection to deny the same right to misdemeanor defendants since there is no adequate distinction between felonies and misdemeanors relevant to factors bearing on the need for a change of venue. As noted *supra* pp. 27-29, the factors contributing to community prejudice may have little or nothing to do with whether the crime charged is classified as a misdemeanor.

The court below quoted a previous decision outlining certain distinctions between felonies and misdemeanors in Wisconsin:

" . . . In most cases the place of imprisonment is different; the statute of limitations is twice as long for a felony as a misdemeanor; one charged with a felony is entitled to a preliminary hearing; the stigma of a felony is greater; and under the repeater statute, more severe penalties are authorized for felonies than for misdemeanors . . . " *State ex rel. Gaynon v. Krueger*, 31 Wis. 2d 609, 620, 143 N.W.2d 437 (1966). (A. 209)

But these distinctions appear to bear no relationship to the need for a change of venue in order to ensure an impartial trial. This Court rejected in *Baldwin v. New York*, 38 U.S. L.Wk. 4554, 4555 (1970), the notion that such traditional distinctions between misdemeanors and felonies were of any particular relevance in determining what class of criminal defendants should be accorded the fundamental

right to jury trial. And in *State ex rel. Plutshak v. State Department of Health and Social Services*, 37 Wis. 2d 713, 155 N.W.2d 549, 157 N.W.2d 567 (1968), the Wisconsin Supreme Court recognized that in determining the right to assigned counsel, the distinction between misdemeanor and felony was of no particular significance, and that instead counsel should be assigned in all cases where the potential maximum penalty exceeded six months.<sup>45</sup> Most important, in the analogous situations involving change of venue in trials by the court, and determination of qualifications of and challenges to jurors, Wisconsin makes no distinction between felonies and misdemeanors. WIS. STAT. ANN. §956.03; §§270.16, 957.14, 957.03, 957.04.

Moreover, it is clear that while some distinctions are drawn between felonies and misdemeanors in Wisconsin, there is no apparent principle governing the classification of offenses. Wisconsin has defined a felony as "[a] crime punishable by imprisonment in the state prison," and a misdemeanor as "every other crime." WIS. STAT. ANN. §939.60 (1955). But there are situations in which misdemeanants may be imprisoned in state prison, and felons incarcerated in the county jail.<sup>46</sup> WIS. STAT. ANN. §959.044 (1945) provides that the place of imprisonment, where none is designated by statute, depends on the length of sentence: the county jail if the maximum is less than one year; the state prison if the maximum is more than one year; and either where the maximum is one year. But this of course does

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<sup>45</sup> See also *Duncan v. Louisiana*, 391 U.S. 145, 159-62 (1968); *Beck v. Winters*, 407 F.2d 125 (8th Cir. 1969); *Harvey v. Mississippi*, 340 F.2d 263, 269 (5th Cir. 1965); *James v. Headley*, 410 F.2d 325, 328 (5th Cir. 1969).

<sup>46</sup> See Note, *Wisconsin Criminal Procedure*, 1966 WIS. L. REV. 430, 488; *Pruitt v. State*, 16 Wis. 2d 169, 114 N.W.2d 148 (1962).

not mean that length of sentence necessarily determines whether a crime is a misdemeanor or felony since many Wisconsin statutes still designate the degree of the crime and/or the place of imprisonment. Also, under Wisconsin's repeater laws, misdemeanors may bring increased penalties and incarceration in state prison without changing the degree of the crime for purposes of the procedural protections provided.<sup>47</sup> Finally, there is considerable confusion and difficulty in determining whether certain offenses are in fact misdemeanors or felonies.<sup>48</sup> Thus there is plainly nothing categorical about the felony-misdemeanor distinction, nor anything inherent in its logic.

Since the distinction between felony and misdemeanor in Wisconsin is based on no coherent or consistent principle of classification, and since it is totally unrelated to the reasons that change of venue should be granted a criminal defendant, the Wisconsin statute denying that right to persons charged with a misdemeanor violates the Equal Protection Clause of the Fourteenth Amendment.

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<sup>47</sup> WIS. STAT. ANN. §939.62 (1957); *State v. Watkins*, 40 Wis. 2d 398, 162 N.W.2d 48 (1968); *Harms v. State*, 36 Wis. 2d 282, 153 N.W.2d 78 (1967).

<sup>48</sup> See generally *State ex rel. Gaynon v. Krueger*, 31 Wis. 2d 609, 143 N.W.2d 437 (1966); Lipton, *The Classification of Crimes in Wisconsin*, 50 MARQ. L. REV. 346 (1966).

## CONCLUSION

**For the foregoing reasons**, this Court should reverse appellant's conviction and remand for a new trial at which appellant would be entitled to change of venue on a showing that community prejudice was such that he could not obtain an impartial jury trial in Milwaukee County.

Respectfully submitted,

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OCT 18 1970

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IN THE

**COURT OF THE UNITED STATES**

October Term, 1970

No. 26

JAMES EDMUND GROFFL

*Appellant,*

STATE OF WISCONSIN,

*Appellee.*

ON APPEAL FROM  
THE SUPREME COURT OF WISCONSIN

**BRIEF FOR APPELLEE**

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## INDEX

	<i>Page</i>
QUESTIONS PRESENTED .....	1
SUMMARY OF ARGUMENT .....	2-3
ARGUMENT .....	4
 I. DENIAL OF THE MOTION FOR A CHANGE OF VENUE WAS NOT A DENIAL OF DUE PROCESS .....	4-18
A. It Cannot be Said, on this Record, that Defend- ant Was Even Probably Denied an Impartial Jury .....	4-11
B. The Change of Venue Device Was Not Essen- tial to Due Process in this Misdemeanor Pros- ecution .....	11-18
 II. CONVICTION OF FELONY IN WISCONSIN CARRIES MORE SERIOUS CONSEQUENCES THAN CONVICTION FOR MISDEMEANOR; THE STATE DOES NOT WITHHOLD EQUAL PROTECTION OF THE LAWS WHEN IT PRO- VIDES ADDITIONAL SAFEGUARDS IN FEL- ONY CASES .....	19-21

## TABLE OF AUTHORITIES

*Cases:*

Adams v. United States ex rel. McCann, 317 U.S. 269 (1942) .....	11
Baldwin v. New York, 38 U.S.L.W.K. 4554, 26 L. ed. 2d 437 (1970) .....	20,21
Buchalter v. New York, 319 U.S. 427 (1943) .....	17

	<i>Page</i>
Carter v. Illinois, 329 U.S. 173 (1946) .....	18
Duncan v. Louisiana, 391 U.S. 145 (1968) .....	12
Estes v. Texas, 381 U.S. 532 (1965) .....	8
Graham v. West Virginia, 224 U.S. 616 (1912) .....	21
Hannah v. Larche, 363 U.S. 420 (1960) .....	17
Irvin v. Dowd, 366 U.S. 717 (1961) .....	8
Mason v. Pamplin, 232 F. Supp. 539 (W.D. Tex. 1964), <i>aff'd. sub nom.</i> Pamplin v. Mason, 364 F. 2d 1 (5 Cir. 1966) .....	11
Pruitt v. State, 16 Wis. 2d 169, 114 N.W. 2d 148 (1962) .....	20
Rideau v. Louisiana 373 U.S. 723 (1963) .....	8,9
Sheppard v. Maxwell 384 U.S. 333 (1966) .....	8,11
State ex rel. Gaynon v. Krueger, 31 Wis. 2d 609, 143 N.W. 2d 437 (1966) .....	20
State v. Woodington, 31 Wis. 2d 151, 142 N.W. 2d 810 (1966) .....	6
United Public Workers v. Mitchell, 330 U.S. 75 (1947) .....	10
United States v. Wood, 299 U.S. 123 (1936) .....	17-18
Williams v. Florida, 38 U.S.L.W.K. 4557, 26L. ed. 2d 446 (1970) .....	12,18

*Constitutions and Statutes:*

<i>S.D. COMP. LAWS</i> §23-28-7 (1967) .....	14
<i>TEX. CODE. CR. PR. ANN.</i> Art. 31.01 (1966) .....	14
<i>VT. STATS. ANN.</i> Tit. 13, §4631 (1969).....	14
<i>WIS. CONST.</i> Art. I, §7 .....	5
<i>WIS. CONST.</i> Art. III, §2 .....	19
<i>WIS. STATS.</i> (1969) §971.22 .....	4,14
<i>WIS. STATS.</i> (1967):	
§256.55(3) .....	7
§270.16 .....	6
§939.60 .....	4,19
§939.62 .....	19
§946.41(1) .....	4
§955.18 .....	5,19
§956.03(1) .....	5
§956.03(3) .....	1,2,18,20
§957.01 .....	5
§957.03 .....	6,20
§957.04 .....	7
§957.07 .....	6
§959.044 .....	19

*Other Authorities:*

<i>Broeder, Voir Dire Examinations: An Empirical Study</i> , 38 <i>SO. CAL. L. REV.</i> 503 (1965).....	15
---	----

	<i>Page</i>
Cipes, <i>MOORE'S FEDERAL PRACTICE</i> , 2d ed., (1969) .....	14
Cummings, <i>The Third Great Adventure</i> , 29 ABAJ 654 (1943) .....	14
Medalie, <i>Federal Rules of Criminal Procedure</i> , 4 LAWYERS GUILD R. (3) 1, 5 (1944) .....	14
Note, <i>Community Hostility and the Right to an Impartial Jury</i> , 60 COLUM. L. REV. 349 (1960) .....	12,15
Note, <i>The Efficacy of a Change of Venue in Protecting a Defendant's Right to an Impartial Jury</i> , 42 NOTRE DAME LAWYER 925 (1967) .....	7,13,15,16
Note, <i>Impartial Jury - Twentieth Century Dilemma: Some Solutions to the Conflict Between Free Press and Fair Trial</i> , 51 CORNELL L.Q. 306 (1966) .....	7,11,12,15
Note, 33 FORD. L. REV. 498 (1965) .....	11,13

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1970

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No. 26

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JAMES EDMUND GROPP, I,  
*Appellant,*

*v.*

STATE OF WISCONSIN,  
*Appellee.*

---

ON APPEAL FROM  
THE SUPREME COURT OF WISCONSIN

---

**BRIEF FOR APPELLEE**

---

QUESTIONS PRESENTED

1. Does the record herein present a factual context sufficiently concrete to enable this Court to determine whether §956.03(3) WIS. STATS. (1967) actually operated to impair this defendant's right to trial by an impartial jury?
2. Could Wisconsin in 1968 limit the availability of the change of venue device to felony cases without violating the right of misdemeanor defendants to trial by an impartial jury?

## SUMMARY OF ARGUMENT

I.A. Defendant, who claims denial of his rights under the Sixth and Fourteenth Amendments, has failed to bring to this Court a record which will adequately show that application of §956.03(3) of the Wisconsin Statutes, which limits changes of venue for community prejudice to felony cases, impaired his right to an impartial jury.

Defendant's affidavit, claiming adverse pretrial publicity, is of no evidentiary value; there is no other evidence of community prejudice in this record. No continuance was requested on grounds of prejudice, and defense counsel made no effort to include proceedings on *voir dire* in the record. A jury was impaneled on the first morning of trial.

Since the record fails to show prejudice, it cannot be *presumed* that there was a probability of jury prejudice, and a determination of the constitutionality of the statute would be an advisory opinion, which this Court will not give.

B. A state may deny a change of venue for community prejudice in cases of less serious crimes without impairing defendant's rights to an impartial jury where, as in Wisconsin, the devices of *voir dire* and continuance are available and post-trial motions may be employed to remedy actual or probable prejudice.

Limitation of the change of venue device to felony cases has not been uncommon in this country. The questionable efficacy of the device, and the expense, delay and possible abuse involved in its exercise warrant its denial in misdemeanor cases, when other remedial devices are available.

II. Regardless of the intricacies of the formula used to distinguish felonies from misdemeanors in Wisconsin, those convicted of crimes determined to be felonies are subjected

to more rigorous penalties than those convicted of misdemeanor. The difference in consequences justifies granting additional procedural safeguards to persons accused of felony.

## ARGUMENT

### I. DENIAL OF THE MOTION FOR A CHANGE OF VENUE WAS NOT A DENIAL OF DUE PROCESS.

#### A. It Cannot Be Said, On This Record, That Defendant Was Even Probably Denied An Impartial Jury.

Defendant was convicted for misdemeanor in Milwaukee County Circuit Court on February 9, 1968, following a trial to a jury of twelve which commenced the previous day.<sup>1</sup>

This conviction arose out of his arrest on August 31, 1967, on a charge of "Resisting an Officer,"<sup>2</sup> a misdemeanor punishable by a fine of not more than \$500 or imprisonment in the county jail for not more than one year, or both.<sup>3</sup>

At the time of trial,<sup>4</sup> a Wisconsin statute authorized changes of venue for community prejudice in felony cases.

<sup>1</sup>The jury was impaneled and sworn before the noon recess on Feb. 8, 1968. The state opened its case at 2 p.m. on February 8, and rested the same day. On February 9, the defense presented its case, the state offered rebuttal testimony, and the case was argued and submitted to the jury at 1:15 p.m. The jury returned to court with its verdict at 4:55 p.m. on February 9, 1968. (A. 13, 14, 15)

<sup>2</sup>§946.41 (1) WIS. STATS. (1967):

"Whoever knowingly resists or obstructs an officer while such officer is doing any act in his official capacity and with lawful authority, may be fined not more than \$500 or imprisoned not more than one year in county jail or both."

<sup>3</sup>"Resisting an Officer" is a misdemeanor, since the county jail is expressly designated as the place of imprisonment upon conviction. §939.60, WIS. STATS. (1967) provides:

"A crime punishable by imprisonment in the state prison is a felony. Every other crime is a misdemeanor."

<sup>4</sup>§971.22, WIS. STATS., effective July 1, 1970, permits a change of venue in all criminal cases. See Chap. 255, Laws of 1969.

As construed by the state courts,<sup>5</sup> the statute *limited* changes of venue for that cause to felony cases, resulting in the denial of defendant's motion for a change of venue in his misdemeanor case.

In order to achieve a reasonably accurate perspective in evaluating this case by Sixth and Fourteenth Amendment standards, some pertinent aspects of Wisconsin criminal procedure should be noted:

—Wisconsin guaranteed trial by a jury of twelve to all persons accused of crime, whether felony or misdemeanor.<sup>6</sup>

—Wisconsin granted to all defendants an absolute right to a change of judge upon the defendant's affidavit that the judge originally designated was prejudiced.<sup>7</sup>

—Wisconsin required a preliminary examination for persons accused of felony, and a finding of probable cause as a prerequisite to the filing of an information.<sup>8</sup>

<sup>5</sup>Rulings of the state courts are reproduced in the Appendix, 8-9, 207.

<sup>6</sup>WIS. CONST. Art I, §7; §957.01 WIS. STATS. (1967)

<sup>7</sup>§956.03 (1) WIS. STATS. (1967). Contrary to the claims in appellant's brief (see pp. 25, 27, 36), this statute provides for a change of judge only on grounds of personal interest or "the prejudice of the judge." The change of judge is permitted in jury trials as well as trials to the court. Community prejudice is not grounds for a change of judge under this section, which provides:

"PREJUDICE OF JUDGE; ANOTHER JUDGE CALLED. If the presiding judge has acted as attorney for a defendant or for the state in the pending action, or if a defendant moves, in the manner provided in civil actions, for a change of venue on account of the prejudice of the judge, another judge shall be called in the manner provided in civil actions to try the action, except that in county courts containing 3 or more branches the case shall be referred to the clerk who shall in accordance with the rules of said court assign the case to another branch of that court for trial or other proceedings.\*\*\*"

<sup>8</sup>§955.18 WIS. STATS. (1967).

—By statute, unfettered participation in *voir dire* examination of prospective jurors was guaranteed to all parties.<sup>9</sup>

—Four peremptory challenges were allowed defendants in all criminal trials; twelve peremptory challenges were allowed in cases exposing the defendant to a sentence of life imprisonment.<sup>10</sup>

—Persons accused of misdemeanor were permitted to waive their right to be present at trial; those accused of felony were not.<sup>11</sup>

—Community prejudice was recognized as sufficient cause for the granting of continuances.<sup>12</sup>

In this procedural setting, defendant was obliged to proceed to trial in Milwaukee County following the denial of his motion for a change of venue. Facing trial by a jury selected from this allegedly hostile community, he had at his disposal a number of procedural alternatives to the change of venue which had been denied. The record does not reveal whether these alternatives were utilized:

1. Although the minutes and docket entries in the lower state courts show that defendant's trial date was continued six times,<sup>13</sup> there is nothing in the record to suggest that defense counsel at any time sought a continuance on the ground

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<sup>9</sup>§270.16 WIS. STATS. (1967).

<sup>10</sup>§957.03 WIS. STATS. (1967).

<sup>11</sup>§957.07 WIS. STATS. (1967).

<sup>12</sup>*State v. Woodington* (1966), 31 Wis. 2d 151, 166, 142 N.W. 2d 810, 817.

<sup>13</sup>Docket entries A. 1, 10, 11, 12.

of prejudicial pretrial publicity or community hostility. While the effectiveness of a continuance may be open to considerable doubt,<sup>14</sup> it is nevertheless significant that defense counsel made no attempt to employ a device traditionally considered as an alternative to a change of venue. If there was present in defendant's case any circumstance rendering continuance totally ineffective to reduce the hazard of an inflamed and prejudiced jury, it is not to be found in this record.

2. The record is entirely devoid of the type of evidence commonly relied upon to show the temper of a community allegedly permeated with prejudice against a defendant: the proceedings on *voir dire*.<sup>15</sup> The record reveals only that a jury of twelve plus one alternate was impaneled and sworn prior to the noon recess on the first day of trial, and that both the prosecution and the defense exercised all of their peremptory challenges.<sup>16</sup> The proceedings on *voir dire* are not reported in the record, and the record reveals no motion or request by counsel that they be reported.<sup>17</sup>

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<sup>14</sup>Note. *Impartial Jury - Twentieth Century Dilemma: Some Solutions to the Conflict Between Free Press and Fair Trial*, 51 CORNELL L. Q. 306, 314-315 (1966).

<sup>15</sup>Note. *The Efficacy of a Change of Venue in Protecting a Defendant's Right to an Impartial Jury*, 42 NOTRE DAME LAWYER 925, 936 (1967):

"To the contrary, it may be argued that the courts' view of removal is the valid one since the *voir dire* examination affords an excellent opportunity to sound out community sentiment."

<sup>16</sup>In Wisconsin, peremptory challenges are exercised following *voir dire* examination, the parties alternately striking names from a list of jurors not excused for cause until only twelve remain. §957.04, WIS. STATS. (1967). The lists herein are at A. 30, 44.

<sup>17</sup>*Voir dire* examinations "need not be reported unless ordered by the court." §256.55 (3), WIS. STATS. (1967).

As a consequence, this court has no way of determining whether any prospective juror was challenged or excused for cause; — or whether any juror had formed any opinions of the defendant or of his guilt or innocence; — or whether any juror had been exposed to allegedly prejudicial sources of information. Thus it is impossible to know, from this record, whether the *voir dire* provided any evidence whatever of conditions rendering suspect the impartiality of the jurors who sat in judgment; indeed, there is nothing in the record to show that defense counsel even *attempted* to examine prospective jurors on *voir dire*. All that can be said, on this record, is that there was apparently no serious difficulty encountered in impaneling a jury.<sup>18</sup>

The compelling evidence of prejudice found by this Court in *Irvin v. Dowd*,<sup>19</sup> *Rideau v. Louisiana*,<sup>20</sup> *Estes v. Texas*,<sup>21</sup> and *Sheppard v. Maxwell*<sup>22</sup> is, therefore, absent from this record. It is not helpful, moreover, to take as true the averments of the motion for change of venue and its supporting affidavit,<sup>23</sup> since they contain only subjective evaluations of the publicity given to the defendant and his activities. The affidavit filed in support of the motion for a change of venue provides little, if any, factual support for a conclusion

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<sup>18</sup>See note 1.

<sup>19</sup>366 U. S. 717 (1961).

<sup>20</sup>373 U. S. 723 (1963).

<sup>21</sup>381 U. S. 532 (1965).

<sup>22</sup>384 U. S. 333 (1966).

<sup>23</sup>A. 23a-25a.

that the jury panel was even *probably* prejudiced. It alleges only that defendant was a well-known civil rights leader, that his activities had received "massive and frequently adverse" publicity, and that "some" of the news media had published "editorial criticisms" of his activities. There is no allegation whatever of distortion of fact or other prejudicial reporting of — or commentary on — the event out of which the misdemeanor charge arose.

If evidence of community prejudice existed, defense counsel could have supplied it for this record. There was nothing to prevent the incorporation of allegedly prejudicial media reports in the affidavit. There was likewise nothing to prevent defendant from introducing such evidence in support of a motion for continuance or, following the verdict, in support of a motion for new trial on grounds of "inherent" or "probable" prejudice.<sup>24</sup> Furthermore, there was nothing which prevented counsel from requesting that the proceedings on *voir dire* be reported for the record.

Defendant does not and cannot claim that this record shows that the twelve jurors who found him guilty were demonstrably prejudiced. He cannot even claim, on this record, that the jurors — or the panel from which they were selected — had previously been exposed to inflammatory or inaccurate or otherwise prejudicial publicity.

The unsatisfactory state of the record with respect to community hostility makes it impossible for any reviewing court to say, as this Court said in *Rideau v. Louisiana*,<sup>25</sup>

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<sup>24</sup>"Appellant contends that because his motion for a change of venue was denied, he had no opportunity to make a record of the community prejudice. This is simply not true. \*\*\*" (Opinion below, A. 213).

<sup>25</sup>373 U. S. 723 (1963).

that "Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality."<sup>26</sup>

Nevertheless, this Court is asked to declare that defendant's conviction cannot stand: *not* because defendant had a Constitutional right to a change of venue in this case, but because his application for that change was denied without hearing, by the application of a statute which limited the availability of this device to those charged with felony.

The Court is therefore called upon by defendant to decide — in the abstract — whether persons charged with misdemeanor *could*, under a hypothetical set of facts evidencing a high degree of community prejudice, be Constitutionally entitled to a change of venue — even though alternative procedural devices designed to dilute or screen out prejudice are available. What is sought is an advisory opinion. This Court will not render advisory opinions;<sup>27</sup> this should be particularly true where, as here, "it is not asking too much that the burden of showing essential unfairness be sustained by him who claims

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<sup>26</sup>Id. at 726.

<sup>27</sup>*United Public Workers v. Mitchell*, 330 U. S. 75, 89 (1947):

"\*\*\*For adjudication of constitutional issues 'concrete legal issues, presented in actual cases, not abstractions,' are requisite."

such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality."<sup>28</sup>

### B. The Change of Venue Device Was Not Essential to Due Process in this Misdemeanor Prosecution.

No defendant is guaranteed an impartial jury in the philosophical sense.<sup>29</sup> Neither Wisconsin's Constitution nor the Constitution of the United States require the impossible; nor do they require that government do everything humanly possible to attain the closest possible approximation of the philosophical ideal. We tolerate acknowledged weaknesses and imperfections in the jury system when those imperfections do not outweigh the social cost of correcting them, or when a suspected imperfection seems slight in comparison with the real detriment suffered through use of a remedial device of doubtful efficacy.

The jury is itself a safeguard. Its impartiality is in turn safeguarded by procedures employed in its selection: the selection of the array is prescribed intricately, and is open to inspection and challenge; the selection of a panel from the array is accomplished by lottery, and the members of the

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<sup>28</sup>*Adams v. United States ex rel. McCann*, 317 U. S. 269, 281 (1942). Under circumstances not present in this record, the party claiming injustice is relieved of this burden. *Sheppard v. Maxwell*, 384 U. S. 333, 351-352 (1966).

Note, 33 FORD L. REV. 498 (1965), wherein the author points out that the *habeas* petitioner in *Mason v. Pamplin*, 232 F. Supp. 539 (W.D. Texas 1964) (*aff'd. sub.nom. Pamplin v. Mason*, 364 F. 2d 1 (5 Cir. 1966), having defaulted in placing evidence of prejudice on the record, failed to show that he had been sufficiently aggrieved by a Texas statute similar to Wisconsin's §956.03(3) to test its constitutionality. The author concludes (at 506-507) that the question of the constitutionality of the Texas statute was not properly before the court, and should not have been decided.

<sup>29</sup>Note, *supra* n. 14, 51 CORNELL L. Q. 306 at 307 (1966).

panel so chosen may be questioned in detail about individual circumstances that may affect their ability to perform their prescribed function. It is not enough that the prospective jurors disclaim prejudice under oath on *voir dire*; all are required to swear that they will perform their duty without partiality. Commonly, the protections erected against possible imperfections in juries are increased in proportion to the degree of punishment sought to be imposed upon the defendant: the number of allowable peremptory challenges may be increased;<sup>30</sup> the jury may be sequestered;<sup>31</sup> and a change of venue or of venire may be provided for in addition to continuance and *voir dire* examination.

While the criminal court jury as an institution is highly regarded as an important deterrent to oppression by government, it may be dispensed with entirely in some cases, for reasons of "efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive noninjury adjudications."<sup>32</sup> And while no state may deny a jury where government seeks to imprison a defendant for longer than six months, a jury composed of fewer than twelve jurors will satisfy federal Constitutional standards.<sup>33</sup>

Defendant now seeks a declaration by this Court that a change of venue, as a method of avoiding community prejudice, is a requirement of the Sixth Amendment as made applicable to the states by the Fourteenth Amendment, and that it is as

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<sup>30</sup>Note, *Community Hostility and the Right to an Impartial Jury*, 60 COLUM. L. REV. 349, 359, footnote 56 (1960).

<sup>31</sup>Note, *supra* n. 14, 51 CORNELL LAW Q. 306, 316 (1966).

<sup>32</sup>*Duncan v. Louisiana*, 391 U.S. 145, 160 (1968).

<sup>33</sup>*Williams v. Florida*, 38 U.S.L.WK. 4557, 26 L. ed. 2d 446 (1970).

fundamental a right as trial by jury, speedy trial, confrontation of prosecution witnesses and assistance of counsel. Further, he seeks an interpretation of those Amendments which would declare unconstitutional the past judgment of the state of Wisconsin that the availability of *voir dire* examinations, continuances, peremptory challenges and post-trial motions sufficiently protected persons accused of misdemeanors from occasions of community prejudice.

Defendant's brief maintains in support of its argument that change of venue is "fundamental to the American scheme of justice" that Wisconsin's statutory limitation of change of venue to felony cases is "almost without precedent."<sup>34</sup> The word "almost" covers a lot of territory.

The brief of appellant concedes, first of all, that states have felt themselves free to establish statutory standards for — and limitations upon — the change of venue device. Note 41 at pp. 31-32 of the brief demonstrates not only substantial variations in state change of venue practice, but also that a number of states, like Wisconsin, have in the past limited the change of venue device to felony cases.<sup>35</sup> In recent years, the trend among the states has been to extend the availability of the device to non-felony cases.<sup>36</sup> Since 1966

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<sup>34</sup>Appellant's brief, p. 30.

<sup>35</sup>Note, 33 FORD L. REV. 498, 507 (1965); footnote 51 lists eight states which by statute limited change of venue to more serious crimes. Note, *The Efficacy of a Change of Venue in Protecting a Defendant's Right to an Impartial Jury*, 42 NOTRE DAME LAWYER 925, 927-929 (1967).

<sup>36</sup>Id. at 928.

Wisconsin, Vermont, South Dakota and Texas have altered their criminal procedures to permit a change of venue in non-felony prosecutions.<sup>37</sup> This trend hardly demonstrates, however, that Wisconsin's former practice in 1968 was "almost without precedent."

Further illustration of the fact that limitations on the availability of the change of venue device are not without precedent may be found in federal practice where, until the advent of Federal Rule of Criminal Procedure 21 in March, 1946, the device was simply not available to any defendant.<sup>38</sup>

While change of venue for local prejudice in misdemeanor cases has been a traditional procedural avenue in many jurisdictions, a significant number of jurisdictions have felt that the right to fair trial by an impartial jury could be protected without it. Given other procedural safeguards, the availability of change of venue was not considered the point of demarcation between fair trial and unfair trial.

The procedural devices employed for the purpose of avoiding possible jury prejudice include change of venue, change

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<sup>37</sup>§971.22, WIS. STATS. (eff. 7/1/70 - Ch. 255, Laws of 1969); VT. STATS. ANN. Tit. 13, §4631 (1969); S.D. COMP. LAWS. §23-28-7 (1967); TEX. CODE CR. PR. ANN. Art. 31.01 (1966).

<sup>38</sup>Medalie, *Federal Rules of Criminal Procedure*, 4 LAWYERS GUILD R. (3) 1, 5 (1944):

"It has long been recognized by many states that a defendant may have his cause removed to another county upon proof of prejudice existing in the locality in which he would otherwise be tried. Curiously, no such right has been recognized by the federal courts."

Cummings, "The Third Great Adventure," 29 ABAJ 654, 655-656 (1943):

"Lawyers not thoroughly familiar with federal practice are somewhat astounded to learn that they may not move for a change of venue, even if they are able to demonstrate that public feeling in the vicinity of the crime may render impossible a fair and impartial trial. This seems to be a defect in the federal law, which the proposed rules would cure."

See also: Cipes, MOORE'S FEDERAL PRACTICE, 2d (1969), §§. 21.01(1), 21.02, 21.03.

of venire, continuance and *voir dire*. The oath-giving is likewise apparently considered an effective safeguard, as are the Court's instructions to disregard out-of-court sources of information and conscious bias or prejudice.<sup>39</sup> In a sense all of these devices are "palliatives," since they are designed to avoid or dilute pre-existing prejudice; prior control of media treatment of the cause, through whatever means are available, effective and necessary, may *prevent* the formation of some forms of prejudice.<sup>40</sup> Once trial has begun, cautionary instructions, sequestration of the jury, control of court officers and the media, and protection of witnesses are devices available to guard against undesirable intrusions into the fact-finding process.

The relative effectiveness of each device heretofore thought to enhance the jury's impartiality, and the relative advantages and disadvantages which each carries with it,<sup>41</sup> are not subject to objective appraisal. Certainly it is true that the efficacy of *voir dire* may be questioned;<sup>42</sup> but the same may be said of a change of venue from one county to another — at least in the latter half of the twentieth century. Continuances are at once a service and a disservice to both sides in many cases.

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<sup>39</sup>Note, *supra* n. 35, 42 NOTRE DAME LAWYER 925, 926-927 (1967); Note, *The Impartial Jury*, 51 CORNELL L. Q. 306, 313-317 (1966); Note, *Community Hostility and the Right to an Impartial Jury*, 60 COLUM. L. REV. 349, 356-370 (1960).

<sup>40</sup>*Id.* at 370-375.

<sup>41</sup>*Id.* at 356-375.

<sup>42</sup>Broeder, *Voir Dire Examinations: An Empirical Study*, 38 SO. CAL. L. REV. 503 (1965). Broeder's study of *voir dire* examinations which were "perfunctory, stilted affairs" is not, however, a valid evaluation of the effectiveness of such examinations when properly conducted.

The effectiveness of many devices heretofore believed to enhance jury impartiality is open to honest and serious debate. What is considered a fundamental right in one state may be regarded as totally unnecessary to fair trial in another; what is regarded as administratively cumbersome or too costly in one time may be thought acceptable and desirable in another.

The present state of our knowledge about the efficacy and necessity of any one of the devices thought to be effective to combat jury prejudice is limited, as is our ability to effectively appraise the social cost of the availability and extensive use of each such device. It may well be, for example, that attitude inventories employed by psychologists would be a far more effective tool for screening out prejudice than any of the methods heretofore employed — change of venue not excepted.

There is room within the jury trial framework for considerable latitude and variations in the methods adopted by the states to enhance impartiality while at the same time protecting the state's right to impose sanctions on offenders in a reasonably efficient manner. There was room, within that framework, for Wisconsin to determine that the expense, delay, possibilities of abuse and questionable efficacy of change of venue<sup>43</sup> were acceptable social costs in felony cases, where

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<sup>43</sup>Note, *supra* n. 35, 42 NOTRE DAME LAWYER 925 (1967) at p. 942:

"Removal is capable of working an extreme dislocation in the administration of criminal justice. It is expensive and generally inconvenient, and it has excellent potential as a dilatory tactic. Further, it amounts to an admission that justice cannot be done in the forum in which the motion is made, which is a severe blow to people who pride themselves in their ability to be fair to their fellows. Finally, removal runs counter to the tradition that the administration of criminal law is primarily the concern of the community in which the crime is committed."

the stakes were high, but not acceptable in misdemeanor cases, where the stakes were lower both in terms of length of sentence and collateral consequences of conviction. In Wisconsin, at the time of defendant's trial, denial of change of venue in misdemeanor cases cannot be said to have denied defendant a "fair trial in a fair tribunal."

This Court has said that

"[D]ue process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. \* \* \* Whether the Constitution requires that a particular right obtain in specific proceedings depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding are all considerations which must be taken into account."<sup>44</sup>

Within the boundaries marked by "specific factual contexts," states have been declared "free to enforce their criminal laws under statutory provisions and common law doctrines as they deem appropriate \* \* \*."<sup>45</sup>

Among the procedural details said to be left to the judgment of the several states are those surrounding the rules for the selection of juries. In *United States v. Wood*, 299 U.S. 123, 145-146, (1936), this Court said:

"In *Stilson v. United States*, 250 U.S. 583, 586, 40 S. Ct. 28, 29, 30, 63 L.Ed. 1154, we said on this point: 'There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury

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<sup>44</sup>*Hannah v. Larche*, 363 U.S. 420, 442 (1960)

<sup>45</sup>*Buchalter v. New York*, 319 U.S. 427, 430 (1943)

is all that is secured. The number of challenges is left to be regulated by the common law or the enactments of Congress.' And the same was held to be true of the authority of Congress to treat several defendants, for this purpose, as one party. It is not necessary to multiply illustrations of the familiar principle which while safeguarding the essence of the constitutional requirements permits readjustments of procedure consistent with their spirit and purpose.

Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula. State courts enforcing similar requirements of state constitutions as to trial by jury have held that legislatures enjoy a reasonable freedom in establishing qualifications for jury service although these involve a departure from common law rules."

Justice Frankfurter wrote in 1946 that the Due Process Clause had not created a "uniform code of criminal procedure" for the states.<sup>46</sup> This Court has affirmed, in *Williams v. Florida*,<sup>47</sup> that the states remain free to establish criminal procedures that do not render utterly sterile the fundamental substantive rights guaranteed by the national Constitution.

Section 956.03(3) of the Wisconsin Statutes did not deny Father Groppi an impartial jury. If his jury was prejudiced against him, the prejudice does not appear in this record as a reality, or even a probability.

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<sup>46</sup>*Carter v. Illinois*, 329 U.S. 173, 175 (1946)

<sup>47</sup>38 U.S.L.WK. 4557, 26 L. ed. 2d 446 (1970)

## II. CONVICTION OF FELONY IN WISCONSIN CARRIES MORE SERIOUS CONSEQUENCES THAN CONVICTION FOR MISDEMEANOR; THE STATE DOES NOT WITHHOLD EQUAL PROTECTION OF THE LAWS WHEN IT PROVIDES ADDITIONAL SAFEGUARDS IN FELONY CASES.

A person convicted of a felony in Wisconsin faces the possibility of imprisonment for more than one year.<sup>48</sup> This class of crime is without exception punishable by imprisonment in the state prison.<sup>49</sup> The convicted defendant is disfranchised,<sup>50</sup> and the conviction carries a considerable social stigma. More severe enhancement of punishment under the repeater statute is authorized for felons than for misdemeanants.<sup>51</sup>

In contrast, a misdemeanor conviction in Wisconsin exposes the defendant to a maximum of a year's incarceration; collateral consequences such as disfranchisement and stigma do not follow or are less severe, and invocation of the repeater principle at a subsequent time carries less risk than that to which a "felony repeater" is exposed.

Accompanying the risk of more serious consequences of conviction of felony are the additional procedural safeguards afforded a felony defendant in Wisconsin: the preliminary (probable cause) hearing<sup>52</sup> and availability of the change of

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<sup>48</sup>§§ 939.60, 959.044, WIS. STATS. (1967)

<sup>49</sup>Id.

<sup>50</sup>WIS. CONST. Art. III, §2

<sup>51</sup>§939.62 WIS. STATS. (1967)

<sup>52</sup>§955.18 WIS. STATS. (1967)

venue device.<sup>53</sup> When the felony involved is punishable by life imprisonment, a further safeguard is provided: the number of allowable peremptory challenges is increased to twelve.<sup>54</sup>

While resort to several statutes and some Wisconsin case law<sup>55</sup> is sometimes necessary to fully understand the classification of misdemeanors and felonies in Wisconsin, only one relevant principle need be extracted for the purpose of judging differentiation in procedural treatment between the two classes of crime: that which is ultimately determined to be a felony carries significantly greater risks for the accused as far as punishment and collateral consequences are concerned. Once a crime is classified as either misdemeanor or felony under Wisconsin rules, the difference in consequences upon conviction fully justifies differences in procedural treatment.

Former sec. 956.03 (3), affording a change of venue to felony defendants only, was not a legislative declaration that community prejudice could not exist against one accused of misdemeanor. It was, rather, a recognition of the need for *additional* protection against such prejudice in cases involving the possibility of more severe penalty. In addition, then, to the remedial devices of continuance and *voir dire* examination, which were available in misdemeanor cases, Wisconsin added the change of venue device at the point that the hazard of severe penalty was significantly increased.

*Baldwin v. New York*<sup>56</sup> did not outlaw the classification of crimes as misdemeanors and felonies, nor did it proscribe

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<sup>53</sup>§956.03 (3) WIS. STATS. (1967)

<sup>54</sup>§957.03 WIS. STATS. (1967)

<sup>55</sup>*State ex rel. Gaynon v. Krueger*, 31 Wis. 2d 609, 143 N.W. 2d 437 (1966); *Pruitt v. State*, 16 Wis. 2d 169, 114 N.W. 2d 148 (1962)

<sup>56</sup>38 U.S.L.WK. 4554, 26 L. ed. 2d 437 (1970)

differences in procedures to be observed in the prosecution of these classifications. *Baldwin* held only that the Sixth Amendment right to jury trial, as applied to the states, attached when "the possible penalty exceeds six months' imprisonment," — an implicit recognition of the Constitutional validity of differentiation in procedure between prosecutions for "serious" and "less serious" offenses.

The Wisconsin Supreme Court, recognizing that it had previously ruled that assigned counsel must be provided for indigent defendants threatened with imprisonment exceeding six months, nevertheless recognized that the legislature might validly provide, as it had, for a different "cutoff point" at which the right to change of venue would attach. While the Wisconsin court expressed a preference for the "six-month cutoff," it correctly recognized that the felony-misdemeanor "cutoff" was within permissible limits of legislative discretion.<sup>57</sup>

Change of venue is not the "fundamental right" that this court dealt with in *Baldwin v. New York*. It is thought to be, under some circumstances, an aid to the achievement of the imperfect practical model of the "impartial jury" guaranteed by state and federal constitutions. Limiting its availability to those charged with felonies is not a denial of equal protection of the laws. The Fourteenth Amendment is not to be construed "as introducing a factitious equality without regard to practical differences that are best met by corresponding differences of treatment."<sup>58</sup>

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<sup>57</sup>A.211.

<sup>58</sup>*Graham v. West Virginia*, 224 U.S. 616, 630 (1912)

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be affirmed.

October 9, 1970.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1970

No. 26

JAMES EDMUND GROPP, JR.,

*Appellant,*

v.

STATE OF WISCONSIN,

*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

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**REPLY BRIEF**

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DEC 2 1970

ROBERT SEAVEN

## TABLE OF CONTENTS

	PAGE
<b>ARGUMENT</b>	
I. Defendant Has Standing to Challenge the Wisconsin Statute Denying a Change of Venue in Misdemeanor Cases .....	2
II. Change of Venue Has Traditionally Been Recognized as a Means of Guaranteeing the Defendant's Right to an Impartial Jury Trial and May, Under Certain Circumstances, Be Required by Due Process of Law .....	4
III. The Distinctions Between the Treatment Accorded Felony and Misdemeanor Defendants in Wisconsin Are Not Adequate to Justify, Under the Equal Protection Clause, Prohibiting a Change of Venue for Those Charged With a Misdemeanor .....	7

## TABLE OF AUTHORITIES

### *Cases:*

<i>Allen v. United States</i> , 4 F.2d 688 (7th Cir. 1924), <i>cert. denied sub nom.</i> , <i>Hunter v. United States</i> , 267 U.S. 597, <i>Mullen v. United States</i> , 267 U.S. 598 and <i>Johnson v. United States</i> , 268 U.S. 689 (1925) .....	7
<i>Baldwin v. New York</i> , 399 U.S. 66 (1970) .....	7
<i>Lias v. United States</i> , 51 F.2d 215 (4th Cir.), <i>aff'd per curiam</i> , 284 U.S. 584 (1931) .....	7
<i>Mason v. Pamplin</i> , 232 F. Supp. 539 (W.D. Tex. 1964), <i>aff'd</i> , <i>Pamplin v. Mason</i> , 364 F.2d 1 (5th Cir. 1966) .....	3

	PAGE
Pruitt v. State, 16 Wis. 2d 169, 114 N.W. 2d 148 (1962)	8
Rideau v. Louisiana, 373 U.S. 723 (1963)	3
State v. Cooper, 4 Wis. 2d 251, 89 N.W. 2d 816 (1958)	5
Stroud v. United States, 251 U.S. 15 (1919)	6
United States v. Beadon, 49 F.2d 164 (2nd Cir.), <i>cert. denied</i> , 284 U.S. 625 (1931)	6
United States v. Mellor, 71 F. Supp. 53 (D. Neb. 1946), <i>aff'd</i> 160 F.2d 757 (8th Cir.), <i>cert. denied</i> , 331 U.S. 848 (1947)	6
Young v. United States, 242 F. 788 (4th Cir.), <i>cert. denied</i> , 245 U.S. 656 (1917)	7
<i>Constitutional and Statutory Provisions:</i>	
LA. CODE CRIM. P. §§621, 622	6
TEX. CODE CRIM. P. Art. 31.01	6
28 U.S.C. §114	6
VT. STAT. Tit. 13, §4613	6
WIS. CONST. Art. 3, §2	8
WIS. STAT. §6.03	8
WIS. STAT. §57.078	8
WIS. STAT. §270.16	9
WIS. STAT. §270.17	4
WIS. STAT. §939.60	8
WIS. STAT. §§954.02, 954.025 (1967), <i>as amended</i> , §§968.02, 968.03, 968.04, 968.26	9

	PAGE
WIS. STAT. §954.08 .....	9
WIS. STAT. §955.18, <i>as amended</i> , §§970.02, 970.03 .....	9
WIS. STAT. §956.03, <i>as amended</i> , §971.22 .....	2
WIS. STAT. §957.03, <i>as amended</i> , WIS. STAT. §972.03 ....	9
WIS. STAT. §957.05 (1967) .....	9
WIS. STAT. §957.14, <i>now</i> §972.01 .....	9
WIS. STAT. §959.044, <i>now</i> §973.02 .....	8
WIS. STAT. §967.01 .....	2
WIS. STAT. §§970.02, 971.10 .....	9
WIS. STAT. §971.22 <i>amending</i> §956.03 .....	2, 6
WIS. STAT. §972.12 .....	9
<i>Other Authorities:</i>	
33 FORD. L. REV. 498 (1965) .....	6
Lipton, <i>The Classification of Crimes in Wisconsin</i> , 50 MARQ. L. REV. 346 (1966) .....	8
Note, <i>Community Hostility and The Right to an Im- partial Jury</i> , 60 COLUM. L. REV. 349 (1960) .....	5
Note, <i>Wisconsin Criminal Procedure</i> , 1966 WIS. L. REV. 430 .....	5, 8
<i>Standards Relating to Fair Trial and Free Press</i> (A.B.A. Project on Minimum Standards for Crim- inal Justice, 1966) .....	4, 5

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JAMES EDMUND GROPP, *Appellant,*

v.

STATE OF WISCONSIN, *Appellee.*

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ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

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**REPLY BRIEF**

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Appellant submits this brief in order to respond to certain claims made by the State in its brief on appeal. *First*, the State claims that no proper record of community prejudice has been made in the instant case, and therefore defendant has no standing to challenge the Wisconsin Statute denying a change of venue in all misdemeanor cases. *Second*, the State claims that the right to change of venue is only one of several available methods of ensuring an impartial jury trial, and that it is not unusual to condition the right to such protections on the seriousness of the offense. It concludes that the denial of any opportunity for venue in the instant case did not violate due process of law. *Finally*, the State claims that there are significant differences in the treatment accorded felony and misdemeanor defendants in Wisconsin and, therefore, that the limitation of the right to change of venue to felony cases did not violate equal protection

of the law. Appellant submits that these arguments are without merit for the reasons set forth briefly below, and urges the Court to reverse his conviction on the grounds set forth in his brief on appeal.

## ARGUMENT

### I.

#### **Defendant Has Standing to Challenge the Wisconsin Statute Denying a Change of Venue in Misdemeanor Cases.**

As the State's brief concedes, there is no question that WIS. STAT. ANN. §956.03(3), as construed by the state courts in the instant case, absolutely prohibited a change of venue in all but felony cases (Brief for Appellee, p. 5).<sup>1</sup> As a result, the trial court denied defendant's motion for a change of venue without allowing him any opportunity to provide the proof he had proffered as to the "nature and extent" of the news coverage his activities had received, and "its effect upon this community and on the right of defendant to an impartial jury trial." (A.23-25; see Brief for Appellant, p. 8, and pp. 14-15, n. 6). The State con-

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<sup>1</sup> WIS. STAT. §971.22 now permits a change of venue in all criminal cases. This section is part of the new Wisconsin Criminal Procedure Code, enacted in 1969, Chap. 255, Laws of 1969. It was effective July 1, 1970, and is applicable prospectively only:

Section 967.01 TITLE AND EFFECTIVE DATE.

Title XLVII may be cited as the criminal procedure code and shall be interpreted as a unit. This code shall govern all criminal proceedings and is effective on July 1, 1970. It applies in all prosecutions commenced on or after that date. Prosecutions commenced prior to July 1, 1970, shall be governed by the law existing prior thereto.

Chap. 255 represents a broad revision of state statutes dealing with criminal procedure; it repeals WIS. STAT. §§954-964 and substitutes therefor new §§967-976.

tends on appeal that since defendant could have presented evidence of community prejudice on a motion for continuance, on *voir dire* proceedings, or on a motion for new trial, the absence of proof of community prejudice in the record deprives defendant of standing to challenge the statute denying him any opportunity for a change of venue. But the question at issue is whether defendant had a right to prove to the court that only a change of venue could adequately protect his right to an impartial jury trial. Clearly defendant's standing to raise this issue and to show that remedies such as continuance, *voir dire* and motion for a new trial may, under certain circumstances, be inadequate to protect the right to an impartial jury cannot depend on whether he pursued such allegedly inadequate remedies. Nor can it depend on any showing of the attitudes revealed by actual jurors on *voir dire*, as this Court specifically held in *Rideau v. Louisiana*, 373 U.S. 723, 727 (1963). Since the trial court denied defendant any opportunity to show that community prejudice was such as to justify a change of venue, on the ground that Wisconsin law would not permit a change of venue in any event, defendant cannot be precluded from challenging the statute's constitutionality because the record fails to show adequate community prejudice. *Mason v. Pamplin*, 232 F. Supp. 539, 542-43 (W.D. Tex. 1964), *aff'd*, *Pamplin v. Mason*, 364 F.2d 1, 6-7 (5th Cir. 1966).

## II.

**Change of Venue Has Traditionally Been Recognized as a Means of Guaranteeing the Defendant's Right to an Impartial Jury Trial and May, Under Certain Circumstances, Be Required by Due Process of Law.**

The State contends that change of venue is only one of several possible methods of ensuring an impartial jury and, therefore, is not constitutionally required (Brief for Appellee, pp. 14-18). But apart from continuance and *voir dire*, whose inadequacies are dealt with in appellant's brief at pp. 22-25,<sup>2</sup> the State points specifically only to change of venue, control of media treatment, oath-giving, cautionary instructions, sequestration of jury and protection of witnesses as "devices available to guard against undesirable intrusions into the fact-finding process" (pp. 14-15). Even if such devices are available and used to their maximum potential, change of venue remains essential, under certain circumstances, to guarantee jury impartiality. Thus, as noted at p. 21 of appellant's brief, the American Bar Association's *Report on Standards Relating to Fair Trial and Free Press* (A.B.A. Project on Minimum Standards for Criminal Justice, 1966) found that even with liberalization of the procedural remedies available to defendants, including *voir dire* examination and continuance, and with radical changes in the law governing release of news to and by the press, the availability of change of venue remained vital. Moreover, there is no indication that Wisconsin has initiated any of the reforms

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<sup>2</sup> See also, with respect to *voir dire*, WIS. STAT. ANN. §270.17: Section 270.17. NEWSPAPER INFORMATION DOES NOT DISQUALIFY.

It shall be no cause of challenge to a juror that he may have obtained information of the matters at issue through newspaper or public journals, if he shall have received no bias or prejudice thereby . . .

recommended by the A.B.A. *Report*. Certainly none of the devices mentioned in appellee's brief constitute adequate or even significant protections under Wisconsin law and practice. Change of venire—a device by which the jury panel is summoned from outside the area of intensive news coverage—is not available in Wisconsin, and in any event is useful only in cases where community sentiment is not strong.<sup>3</sup> Nor has Wisconsin apparently undertaken to change in any way the freedom traditionally accorded news media with respect to trial coverage, nor to assert any of the kinds of controls over the release of news to or by the press recommended by the A.B.A. *Report*. Oath-giving and cautionary instructions are obviously even less effective devices than the *voir dire* for getting at jurors' conscious and unconscious prejudices. Sequestration of the jury is rarely used in Wisconsin except in life imprisonment or capital cases;<sup>4</sup> in any event, its effectiveness is limited because it guards only against prejudicial publicity which occurs *after* the trial has begun, it may not screen out strong community feeling, and the inconvenience to the jurors may prejudice them against the defendant.<sup>5</sup>

The State also contends that it is not unusual to condition devices designed to ensure jury impartiality on the seriousness of the offense. But in fact, in Wisconsin, as elsewhere generally, the availability of such devices is

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<sup>3</sup> See A.B.A. *Report* at 137-38; *Note, Community Hostility and The Right to an Impartial Jury*, 60 COLUM. L. REV. 349, 366-67 (1960).

Only a very few jurisdictions provide for change of venire and these also authorize change of venue under similar circumstances. See *Note, supra*, at 365-67; A.B.A. *Report*, p. 137, nn. 159, 160.

<sup>4</sup> See *State v. Cooper*, 4 Wis. 2d 251, 89 N.W.2d 816 (1958); *Note, Wisconsin Criminal Procedure*, 1966 WIS. L. REV. 430, 479.

<sup>5</sup> A.B.A. *Report* at pp. 140-42.

not limited to felony cases with the *sole* exception of the change of venue statute at issue in the instant case.<sup>6</sup>

The State apparently concedes that virtually all American jurisdictions today provide for a change of venue in all serious criminal cases, regardless of whether they are classified as felony or misdemeanor, arguing only that *in the past* a number of states have limited the change of venue device to felony cases. But as pointed out in the Brief for Appellant, at pp. 31-32 and n. 41, only a few jurisdictions have *ever* so limited change of venue, and the trend has been toward elimination of any such distinction.<sup>7</sup>

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<sup>6</sup> The only distinction made in Wisconsin is for cases involving possible life imprisonment: in such cases additional peremptory challenges are available, and sequestration of the jury is mandatory rather than discretionary. See p. 9, nn. 14, 16, *infra*.

<sup>7</sup> The reference in Brief for Appellee, p. 13, n. 35, to footnote 51 of 33 FORD. L. REV. 498, 507 (1965) as listing eight states which by statute limited change of venue to more serious crimes is misleading. Included among the eight are Maryland, where a distinction is drawn only between capital and non-capital cases, and only in terms of whether the right to change of venue is absolute or depends on a showing of necessity; Massachusetts, where the statute providing for change of venue in capital crimes was held in 1911 not to limit the inherent right to change of venue in all criminal cases; and Pennsylvania, where the right to change of venue in felonies and misdemeanors is distinguished only in terms of the kind of proof required. See Brief for Appellant pp. 31-32, n. 41, for citations and descriptions of relevant statutes and cases. Also included among the eight listed in the Fordham Note are Louisiana, Texas, Vermont and Wisconsin, all of which amended their laws to remove such a distinction. See, LA. CODE CRIM. P. §§621, 622 (1966); TEX. CODE CRIM. P. Art. 31.01 (1966); VT. STAT. Tit. 13, §4631 (1969); WIS. STAT. §971.22 (1969).

Appellee also argues that prior to 1946, change of venue was not available in federal practice. However, federal law did provide for a change of venue from one division to another within a single district. 28 U.S.C. §114; see, e.g., *Stroud v. United States*, 251 U.S. 15, 18-19 (1919); *United States v. Beadon*, 49 F.2d 164 (2nd Cir.), *cert. denied*, 284 U.S. 625 (1931); *United States v. Mellor*, 71 F. Supp. 53, 64 (D. Neb. 1946), *aff'd*, 160 F.2d 757 (8th Cir.),

## III.

**The Distinctions Between the Treatment Accorded Felony and Misdemeanor Defendants in Wisconsin Are Not Adequate to Justify, Under the Equal Protection Clause, Prohibiting a Change of Venue for Those Charged With a Misdemeanor.**

The State argues, at pp. 19-21 of its brief on appeal, that conviction of a felony in Wisconsin carries more serious consequences than conviction of a misdemeanor, and that felony defendants have therefore been provided additional procedural safeguards, including the right to change of venue.

The only factors mentioned supporting the claim that a felony conviction carries more serious consequences are length and place of punishment, disfranchisement and social stigma. But this Court, as well as the Wisconsin Supreme Court, has rejected the motion that such traditional distinctions are of any particular relevance in determining what class of criminal defendants should be accorded fundamental procedural protections. See *Baldwin v. New York*, 399 U.S. 66 (1970); see generally appellant's brief at pp. 35-36. In any event, on close examination the distinctions alleged fade. Neither length nor place of punishment necessarily determines the degree of a crime in Wis-

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*cert. denied*, 331 U.S. 848 (1947). Moreover, a number of cases decided prior to 1946 indicate that there was discretion to grant a change of venue generally if the circumstances warranted it. See, e.g., *Young v. United States*, 242 F. 788, 792 (4th Cir.) *cert. denied* 245 U.S. 656 (1917); *Lias v. United States*, 51 F.2d 215, 217 (4th Cir.), *aff'd per curiam*, 284 U.S. 584 (1931); *Allen v. United States*, 4 F.2d 688, 695-98 (7th Cir. 1924), *cert. denied sub nom. Hunter v. United States*, 267 U.S. 597, *Mullen v. United States*, 267 U.S. 598 and *Johnson v. United States*, 268 U.S. 689 (1925).

consin. A misdemeanor can be sentenced to state prison for more than a year;<sup>8</sup> a felon can be sentenced to a county jail for less than a year. It is only if the substantive statute fails to provide the place of imprisonment that the length of the sentence affects the place and, therefore, the degree of the crime. WIS. STAT. §959.044, now §973.02; §939.60. Even then length of sentence is not determinative, but instead a variety of complicated factors enter into the decision as to how the conviction should be treated. See generally Lipton, *The Classification of Crimes in Wisconsin*, 50 MARQ. L. REV. 346 (1966); Note, *Wisconsin Criminal Procedure*, 1966 WIS. L. REV. 430, 487-89. Also, while Wisconsin's repeater statute does provide for more severe enhancement of punishment for felons than for misdemeanants, it also means, as noted in appellant's brief at p. 37, n. 47, that misdemeanors can bring increased penalties and incarceration in state prison. The fact that conviction of a felony carries the collateral consequence of disfranchisement is hardly significant in light of Wisconsin's statutes providing for the automatic restoration of such civil rights upon satisfaction of sentence. See WIS. CONST. Art. 3, §2; WIS. STAT. §§6.03 (1967); 57.078 (1959). And the social stigma attached to a conviction is not likely to be determined by whether it is officially labelled a misdemeanor or felony but rather by the nature of the crime and the seriousness with which it is treated by authorities. There is then little to justify any conclusion that a felony conviction carries with it more serious consequences than a misdemeanor conviction.

Similarly, there are virtually no significant differences in the procedural safeguards accorded felony and misdemeanor defendants. The only one mentioned by the State is the felony defendant's right to a preliminary hearing.

<sup>8</sup> See, Note, *Wisconsin Criminal Procedure*, 1966 WIS. L. REV. 430, 488; *Pruitt v. State*, 16 Wis. 2d 169, 114 N.W. 2d 148 (1962).

WIS. STAT. §955.18 (1967), *as amended*, WIS. STAT. §970.02 (1)(c), (4), (5), §970.03 (1969).<sup>9</sup> This is hardly too significant, especially in light of the fact that there are procedures guaranteeing a judicial finding of probable cause before a warrant or summons can be issued for a misdemeanor's arrest,<sup>10</sup> and guaranteeing the misdemeanor's right to a prompt trial.<sup>11</sup> With respect to virtually all other procedural protections including the right to jury trial,<sup>12</sup> no distinction is made between felony and misdemeanor. And, most significant, with respect to all protective devices aimed at ensuring a fair and impartial jury, no such distinction is drawn. Thus the law is identical for felonies and misdemeanors with respect to the selection of the jury, including the summoning of jurors, impaneling and qualifications, challenges for cause<sup>13</sup> and peremptory challenges,<sup>14</sup> and with respect to instructions,<sup>15</sup> sequestration,<sup>16</sup> and continuance.

In conclusion, the distinctions mentioned by the State between the treatment accorded felony and misdemeanor defendants in Wisconsin are of minor importance. Fur-

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<sup>9</sup> Prior to 1961 there was no provision limiting the right to preliminary hearing to felony cases. See WIS. STAT. §954.08 (1949).

<sup>10</sup> WIS. STAT. §954.02, 954.025 (1967), *as amended*, §§968.02, 968.03, 968.04, 968.26 (1969).

<sup>11</sup> WIS. STAT. §§970.02 (3), 971.10 (1969).

<sup>12</sup> See Brief for Appellant pp. 15-16, n. 7; Brief for Appellee, p. 5, n. 6.

<sup>13</sup> See generally WIS. STAT. §957.14 (1967), *now* §972.01 (1969); WIS. STAT. §270.16 (1967).

<sup>14</sup> WIS. STAT. §957.03 (1967) (4 peremptory challenges allowed in all cases except those involving possible life imprisonment where 12 allowed), *as amended*, WIS. STAT. §972.03 (1969) (same except that in life cases number reduced from 12 to six).

<sup>15</sup> See note 13 *supra*.

<sup>16</sup> WIS. STAT. §972.12 (1969); See also former §957.05 (1967).

ther, when Wisconsin procedures are looked at as whole, it is clear that there is no significant distinction in the treatment accorded misdemeanor and felony defendants, that there is no coherent or consistent principle of classification of crimes, and that a crime's classification is totally unrelated to the reasons that change of venue may be required to vindicate a defendant's constitutional right to an impartial jury. (See generally Brief for Appellant, pp. 34-37.)

Respectfully submitted,

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

## SUPREME COURT OF THE UNITED STATES

### Syllabus

### GROPPI *v.* WISCONSIN

#### APPEAL FROM THE SUPREME COURT OF WISCONSIN

No. 26. Argued December 7, 1970—Decided January 25, 1971

State law that categorically prevents a change of venue for a jury trial in a criminal case, regardless of the extent of local prejudice against the defendant, solely on the ground that the crime with which he is charged is a misdemeanor *held* violative of the right to trial by an impartial jury guaranteed by the Fourteenth Amendment. Pp. 3-7.

41 Wis. 2d 312, 164 N. W. 2d 266, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which DOUGLAS, HARLAN, BRENNAN, WHITE, and MARSHALL, JJ., joined. BLACKMUN, J., filed a concurring opinion, in which BURGER, C. J., joined. BLACK, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

## SUPREME COURT OF THE UNITED STATES

No. 26.—OCTOBER TERM, 1970

James Edmund Groppi,	} On Appeal From the Supreme Court of Wisconsin.
Appellant,	
v.	
State of Wisconsin.	

[January 25, 1971]

MR. JUSTICE STEWART delivered the opinion of the Court.

On August 31, 1967, during a period of civil disturbances in Milwaukee, Wisconsin, the appellant, a Roman Catholic priest, was arrested in that city on a charge of resisting arrest. Under Wisconsin law that offense is a misdemeanor, punishable by a fine of not more than \$500 or imprisonment in the county jail for not more than one year, or both.<sup>1</sup> After a series of continuances, the appellant was brought to trial before a jury in a Milwaukee County court on February 8, 1968. The first morning of the trial was occupied with qualifying the jurors, during the course of which the appellant exhausted all of his peremptory challenges.<sup>2</sup> The trial then proceeded, and at its conclusion the jury convicted the appellant as charged.

Prior to the trial, counsel for the appellant filed a motion for a change of venue from Milwaukee County "to a county where community prejudice against this defendant does not exist and where an impartial jury trial

<sup>1</sup> "Whoever knowingly resists or obstructs an officer while such officer is doing any act in his official capacity and with lawful authority, may be fined not more than \$500 or imprisoned not more than one year in county jail or both." Wis. Stat. § 946.41 (1) (1967).

<sup>2</sup> Apparently no transcript was made of the *voir dire* proceedings.

can be had." The motion asked the court to take judicial notice of "the massive coverage by all news media in this community of the activities of this defendant," or, in the alternative, that "the defendant be permitted to offer proof of the nature and extent thereof, its effect upon this community and on the right of defendant to an impartial jury trial." The trial judge denied the motion, making clear that his ruling was based exclusively on his view that Wisconsin law did not permit a change of venue in misdemeanor cases.<sup>3</sup>

On appeal, the Supreme Court of Wisconsin affirmed the conviction. 41 Wis. 2d 312, 164 N. W. 2d 266. It held that the trial judge had been correct in his understanding that a Wisconsin statute foreclosed the possibility of a change of venue in a misdemeanor prosecution.<sup>4</sup> It further held that this state law was constitutionally valid, pointing out that "it would be extremely unusual for the community as a whole to prejudice the guilt of any person charged with a misdemeanor." 41 Wis. 2d, at 317, 164 N. W. 2d, at 268. The court also noted that a defendant in a Wisconsin misdemeanor

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<sup>3</sup> The Court: . . . "So, therefore, the change of venue as asked for in the motion for a change of venue will be denied; it not being provided for in the Wisconsin Statutes. . . . No, I'm denying the motion for a change of venue because this is a misdemeanor case and not a felony. And the Wisconsin Statute does not provide for a change of venue in a misdemeanor matter."

<sup>4</sup> The relevant statute in effect at the time of the appellant's trial was Wis. Stat. § 956.03 (3), which provided:

"If a defendant who is charged with a felony files his affidavit that an impartial trial cannot be had in the county, the court may change the venue of the action to any county where an impartial trial can be had. Only one change may be granted under this subsection."

Wis. Stat. § 971 (22), effective July 1, 1970, now permits a change of venue in all criminal cases. See ch. 255, [1969] Laws of Wisconsin 650.

prosecution has a right to ask for continuances and to challenge prospective jurors on *voir dire*, and if "these measures are still not sufficient to provide an impartial jury, the verdict can be set aside after trial based on the denial of a fair and impartial trial." 41 Wis. 2d., at 321, 164 N. W. 2d, at 270. Two members of the court dissented, believing that the state statute did not absolutely forbid a change of venue in a misdemeanor prosecution, and that if the statute did contain such a prohibition it was constitutionally invalid. 41 Wis. 2d, at 325, 164 N. W. 2d, at 272.

This appeal followed, and we noted probable jurisdiction. 398 U. S. 957. As the case reaches us we must, of course, accept the construction that the Supreme Court of Wisconsin has put upon the state statute. *E. g.*, *Kingsley Pictures Corp. v. Regents*, 360 U. S. 684, 688. The question before us, therefore, goes to the constitutionality of a state law that categorically prevents a change of venue for a criminal jury trial, regardless of the extent of local prejudice against the defendant, on the sole ground that the charge against him is labeled a misdemeanor.<sup>5</sup> We hold that this question was answered correctly by the dissenting justices in the Supreme Court of Wisconsin.<sup>6</sup>

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<sup>5</sup> We reject the suggestion that the appellant is not in a position to attack the statute because he made an insufficient showing of community prejudice. His motion for a change of venue explicitly asked in the alternative that he be permitted to "offer proof" of the nature and extent of the local prejudice against him. His motion was denied in its entirety, thus foreclosing any opportunity to produce evidence of a prejudiced community. The trial court's ruling was, of course, wholly consistent with its view that it was powerless to grant a change of venue under Wisconsin law, regardless of what showing of local prejudice might have been made.

<sup>6</sup> Accord, *Pamplin v. Mason*, 364 F. 2d 1 (CA5); *State ex rel. Ricco v. Biggs*, 198 Ore. 413, 255 P. 2d 1055.

The issue in this case is not whether the Fourteenth Amendment requires a state to accord a jury trial to a defendant on a charge such as the appellant faced here.<sup>7</sup> The issue concerns, rather, the nature of the jury trial that the Fourteenth Amendment commands, when trial by jury is what the State has purported to accord.<sup>8</sup> We had occasion to consider this precise question almost 10 years ago in *Irvin v. Dowd*, 366 U. S. 717. There we found that an Indiana conviction could not constitutionally stand because the jury had been infected by community prejudice before the trial had commenced. What the Court said in that case is wholly relevant here:

"In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver*, 333 U. S. 257; *Tumey v. Ohio*, 273 U. S. 510. 'A fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison*, 349 U. S. 133, 136. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial. Cf. *Thompson v. City of Louisville*, 362 U. S. 199. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law

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<sup>7</sup> That question was answered affirmatively in *Baldwin v. New York*, 399 U. S. 66.

<sup>8</sup> Wisconsin grants a right to trial by jury in all misdemeanor cases. See *State ex rel. Murphy v. Voss*, 34 Wis. 2d 501, 505, 149 N. W. 2d 595, 597; *State ex rel. Sauk County District Attorney v. Gollmar*, 32 Wis. 2d 406, 410, 145 N. W. 2d 670, 672.

as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416. . . ." 366 U. S., at 722.

There are many ways to try to assure the kind of impartial jury that the Fourteenth Amendment guarantees.<sup>9</sup> In *Sheppard v. Maxwell*, 384 U. S. 333, the Court enumerated many of the procedures available, particularly in the context of a jury threatened by the poisonous influence of prejudicial publicity during the course of the trial itself. 384 U. S., at 357-363. Here we are concerned with the methods available to assure an impartial jury in a situation where, because of prejudicial publicity or for some other reason, the community from which the jury is to be drawn may already be permeated with hostility toward the defendant. The problem is an ancient one. Mr. Justice Holmes stated no more than a commonplace when, two generations ago, he noted that "[a]ny judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere." *Frank v. Mangum*, 237 U. S. 309, at 349 (dissenting opinion).

One way to try to meet the problem is to grant a continuance of the trial in the hope that in the course of time the fires of prejudice will cool. But this hope may not be realized, and continuances, particularly if they are repeated, work against the important values implicit in the constitutional guarantee of a speedy trial.<sup>10</sup> Another way is to provide a method of jury qualification that will promote, through the exercise of challenges to the venire—peremptory and for cause—the exclusion of pro-

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<sup>9</sup> The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . ." (Emphasis added.)

<sup>10</sup> See *Klopfer v. North Carolina*, 386 U. S. 213; *Smith v. Hooey*, 393 U. S. 374; *Dickey v. Florida*, 398 U. S. 30; *id.*, at 39 (concurring opinion of BRENNAN, J.).

spective jurors infected with the prejudice of the community from which they come. But this protection, as *Irvin v. Dowd*, *supra*, shows, is not always adequate to effectuate the constitutional guarantee.<sup>11</sup>

On at least one occasion this Court has explicitly held that only a change of venue was constitutionally sufficient to assure the kind of impartial jury that is guaranteed by the Fourteenth Amendment. That was in the case of *Rideau v. Louisiana*, 373 U. S. 723. We held that "it was a denial of due process of law to refuse the request for a change of venue, after the people of Calcasieu Parish had been exposed repeatedly and in depth" to the prejudicial pre-trial publicity there involved. 373 U. S., at 726. *Rideau* was not decided until 1963, but its message echoes more than 200 years of human experience in the endless quest for the fair administration of criminal justice.<sup>12</sup>

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<sup>11</sup> See generally Broeder, *Voir Dire Examinations: An Empirical Study*, 38 So. Cal. L. Rev. 503 (1965).

<sup>12</sup> See *Rex v. Harris*, 3 Burr. 1330, 1333, 97 Eng. Rep. 858, 859 (K. B. 1762): "Notwithstanding the locality of some sorts of actions, or of informations for misdemeanors, if the matter can not be tried at all, or can not be fairly and impartially tried in the proper county, it shall be tried in the next adjoining county." (Lord Mansfield.)

See also *Crocker v. Justices of the Superior Court*, 208 Mass. 162, 178-179, 94 N. E. 369, 376-377 (1911):

"This review demonstrates that the great weight of authority supports the view that courts, which by statute or custom possess a jurisdiction like that of the Kings Bench before our revolution, have the right to change the place of trial, when justice requires it, to a county where an impartial trial may be had.

"... There can be no justice in a trial by jurors inflamed by passion, warped by prejudice, awed by violence, menaced by the virulence of public opinion or manifestly biased by any influences operating either openly or insidiously to such an extent as to poison the judgment and prevent the freedom of fair action. Justice cannot be assured in a trial where other considerations enter the minds

It is doubtless true, as the Supreme Court of Wisconsin said, that community prejudice is not often aroused against a man accused only of a misdemeanor. But under the Constitution a defendant must be given an opportunity to show that a change of venue is required in *his* case. The Wisconsin statute wholly denied that opportunity to the appellant.

Accordingly, the judgment is vacated, and the case is remanded to the Supreme Court of Wisconsin for further proceedings not inconsistent with this opinion.<sup>13</sup>

*It is so ordered.*

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of those who are to decide than the single desire to ascertain and declare the truth according to the law and the evidence. A court of general jurisdiction ought not to be left powerless under the law to do within reason all that the conditions of society and human nature permit to provide an unprejudiced panel for a jury trial."

See also, *e. g.*, *State v. Albee*, 61 N. H. 423, 60 Am. Rep. 325 (1881).

<sup>13</sup> Whether corrective relief can be afforded the appellant short of a new trial will be for the Wisconsin courts to determine in the first instance. Cf. *Coleman v. Alabama*, 399 U. S. 1, 10-11.

# SUPREME COURT OF THE UNITED STATES

No. 26.—OCTOBER TERM, 1970

James Edmund Groppi,	} On Appeal From the Supreme Court of Wisconsin.
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[January 25, 1971]

MR. JUSTICE BLACKMUN, whom THE CHIEF JUSTICE joins, concurring.

Although I agree in large part with the reasoning of MR. JUSTICE BLACK'S opinion in dissent, I nevertheless join in the Court's judgment that this conviction of Father Groppi must be vacated and the case remanded for further proceedings. In so doing, however, I feel compelled to make the following observations:

1. The primary issue, it seems to me, is whether the defendant received a fair trial, not whether, as a matter of abstract constitutional law, he was entitled to a change of venue in a Wisconsin misdemeanor prosecution in 1968.

2. A fair trial, of course, is fundamental. No one disputes that. As the Court points out in footnote 12 of its opinion, this principle of English-American jurisprudence was evolved prior to the embodiment of the treasured concepts of an impartial jury in the Sixth Amendment and of due process in the Fifth and Fourteenth.

3. If the defense believes that a fair trial is unlikely because of community prejudice, that is a matter for proof by the defense, and, when proved, should constitutionally warrant, and indeed demand, a change of venue in any case, whether the prosecution be for a felony or for a misdemeanor.

4. Thus, I find myself in agreement with the two dissenting Justices of the Supreme Court of Wisconsin and with that court's Chief Justice, in concurring in the

result of the majority opinion, when the three conclude, 41 Wis. 2d, at 324, 325; 164 N. W. 2d, at 272, that a change of venue in a misdemeanor case is constitutionally required upon a proper showing.

5. I am at a loss to understand how a change of venue statute expressed in positive but permissive terms and specifically applicable to felony cases can be construed to embody a negative prohibition for misdemeanor cases, particularly with regard to so fundamental a right as the right to have a trial untainted by community prejudice. The statutory interpretation so made is all the more unexpected because it raises an otherwise quite avoidable constitutional issue.

6. But the Wisconsin court has spoken and, by majority vote, has construed the state statute then in effect in that very way. Construction of the statute is the state court's task. It is not our task. And we are bound by the Wisconsin court's decision as to the meaning and application of a Wisconsin statute.

7. The record before us leaves much to be desired. It discloses no formal offer of proof of the kind customarily made. It contains no transcript of the *voir dire*, and thus there is no way in which we or anyone else can evaluate from the *voir dire* the presence, or the possibility of the presence, of actual prejudice in any member of the jury panel. Although a "motion after verdict" was made and although it referred to "the ground of community prejudice," the motion does not in so many words assert that this defendant actually was denied a fair and impartial trial. Neither is the motion supported by affidavits incorporating the claimed prejudicial media reports.

8. The jury appears to have been selected expeditiously and without difficulty during a single morning. And we note what appears to be conflicting evidence in the record as to Father Groppi's behavior at the point of his arrest, evidence which would support a fair jury's conclusion

either way, that is, that he did resist arrest or that he did not resist arrest, within the meaning and application of the Wisconsin statute. On balance, in the face of what may be regarded as a ruling by the trial court that no showing, however persuasive, of community prejudice and its effect upon the jury actually selected could command a change of venue in this misdemeanor case, I am content to join in the vacation of the judgment of conviction and in the remand in order to allow the defendant to attempt to make his proof.

9. I would stress, however, more than by the three-line final footnote which may be lost to the reader who is more interested in the notoriety of the case than in what we are doing today by way of specific ruling, that this remand does not *necessarily* mean a new trial for Father Groppi, and freedom from his conviction on the charge of resisting arrest. The defendant is to have his opportunity to demonstrate prejudice and the likelihood of an unfair trial. If he fails in that quest, or if he now refuses to undertake it, the judgment of conviction may be reinstated. If he does not fail, then of course the conviction falls and the State is remitted to its choice between a new trial or a dismissal of the charge.

10. Finally, I doubt very much whether this rather unimportant case, but an admittedly sensitive one because of the identity of the defendant and the means he has selected to make his protests known, at all approaches the circumstances and the offensive character of what this Court condemned in *Sheppard v. Maxwell*, 384 U. S. 333 (1966), in *Rideau v. Louisiana*, 373 U. S. 723 (1963), and in *Irvin v. Dowd*, 366 U. S. 717 (1961), cited in the Court's opinion. Nevertheless, unfairness anywhere, in small cases as well as in large, is abhorred, is to be ferreted out, and is to be eliminated. Despite the unsatisfactory record, this defendant must have his opportunity to demonstrate what he alleges.

# SUPREME COURT OF THE UNITED STATES

No. 26.—OCTOBER TERM, 1970

James Edmund Groppi,	}	On Appeal From the Supreme Court of Wisconsin.
Appellant,		
v.		
State of Wisconsin.		

[January 25, 1971]

MR. JUSTICE BLACK, dissenting.

I dissent from the Court's vacation of the judgment of conviction. I agree, of course, that this appellant is entitled to trial before an impartial jury. This right is guaranteed by the Sixth Amendment and made binding on the States by the Fourteenth. *Ante*, at —. Cf. *Parker v. Gladden*, 385 U. S. 363 (1966); see also *Adamson v. California*, 332 U. S. 46, 68 (1947) (dissenting opinion of MR. JUSTICE BLACK).

As the Wisconsin Supreme Court suggested, the right to trial before an impartial jury can be protected in many ways: by granting a continuance until community passions subside; by challenging jurors for cause and by preemptory challenges during *voir dire* proceedings. But it simply cannot be said that the right to trial by an impartial jury must necessarily include a right to change of venue. It may or may not be wiser to implement the Sixth Amendment by a change of venue provision, but in my view, the Constitution does not require it. If the usual devices for protection of the Sixth Amendment right to trial by an impartial jury are insufficient, the defendant can always be given a new trial on the grounds of jury prejudice.

The Court suggests that *Rideau v. Louisiana*, 373 U. S. 723 (1963), controls the disposition of this case. But

there we held that prejudicial publicity was so extensive that it was a denial of due process to refuse a motion for change of venue where the State had provided for venue changes as a method of ensuring an impartial jury. See Louisiana Revised Statutes 15:293. Here Wisconsin has not chosen to provide that means of implementing the Sixth Amendment right in misdemeanor cases. So long as a defendant can protect his Sixth Amendment right by a motion for a new trial, I see no constitutional infirmity in the Wisconsin statute. Nor does *Irvin v. Dowd*, 366 U. S. 717, compel the majority's result. There we held that a motion for a second change of venue should have been granted despite a state statute which seemingly permitted only one change. However, we carefully pointed out that the Indiana Supreme Court had previously held as a matter of state law that the statute's literal wording did not foreclose a second change of venue. 366 U. S., at 721, citing *Gannon v. Porter Circuit Court*, 239 Ind. 637, 159 N. E. 2d 713 (1959).

This is not a case where a State has made it impossible for a defendant to implement his right to an impartial jury trial. Wisconsin law provides for *voir dire* and continuances, and this appellant exercised his right to make preemptory challenges to jurors. In holding that appellant had no constitutional right to a change of venue in a misdemeanor case, the Wisconsin Supreme Court pointed out that he could raise the claim of denial of an impartial jury by a motion for a new trial in accordance with Wisconsin procedure. 41 Wis. 2d 312, 321, 164 N. W. 2d 266, 270 (1969). Of course it is difficult, even in a small county, to show that its population is so saturated with prejudice that no impartial jury can be selected from that group. It is likely to be especially difficult in a county as large as Milwaukee, with its

population of more than one million. However difficult that may be, appellant has a right under Wisconsin law to bring forth any relevant evidence to show that the jury that tried him was not impartial. I would remand this case for a hearing on a motion for a new trial.